Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-100

No. _____

In The

Supreme Court of the United States

October Term, 1988

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

Petitioner,

vs.

JOSEPH P. FITCHIK, LINDA A. DeGIROLAMO, FELIX A. GUZMAN, SIDNEY KINNEAR, KENNETH G. BANTA, WILLIAM ROCKWELL, ROBERT K. HEATON, WILLIAM P. McKENNA, ANDY M. SEAMON, CRAIG A. CONLON, LAWRENCE O'HALLORAN, DENNIS MARTIN, ROBERT G. STOCKER, SR., CLIFFORD E. WILLIAMSON, DAVID J. CHWASZCSEWSKI, ASHRAF GHOBRIAL, LOUIS D. ELLIS, WILLIAM HAZELTON, GEORGE FEATHERMAN, JOSEPH L. DUFFY, JAMES C. HARDEN, JR., EDWARD J. FLILLER, PHILIP ROXAS, CRAIG A. CONLON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a State mass transportation agency with statewide jurisdiction which is governed by a board made up of three State officers and four public members appointed by the Governor with the advice and consent of the State's Senate, whose every action is subject to the Governor's veto and who are given a legislative mandate to provide an efficient public transportation system which the Legislature described as "an essential public purpose" and the "responsibility of the State to establish" and which is dependent for its existence on substantial State appropriations is the *alter ego* of the State entitled to Eleventh Amendment immunity from suit in the federal courts?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, New Jersey Transit Rail Operations, Inc., (New Jersey Transit), hereby petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The judgment of the Third Circuit Court of Appeals sitting in *banc*, reversing, by an eight to five vote, the panel's decision that the Eleventh Amendment precluded suit against the petitioner was entered on April 17, 1989, and is reproduced in the Appendix to this petition. (App. at 1a). The prior judgment of the panel of the Third Circuit Court of Appeals was entered on October 24, 1988 and is reproduced in the Appendix to this petition. (App. at 52a). Representative opinions of the district judges dismissing the actions for want of jurisdiction are reproduced in the Appendix to this petition.* (App. at 99a, 120a, 130a, 135a, 144a, 148a).

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* The Honorable John W. Bissell, U.S.D.J., entered separate, but identical, opinions in the following cases: Joseph L. Duffy, Felix E. Guzman, James C. Harden, Jr., Robert K. Heaton, William P. McKenna, Philip Roxas, Andy M. Seamon, Lynn G. Stigliano, Robert Stocker, Sr., and Clifford E. Williamson. In the interests of economy, only the Felix E. Guzman opinion appears in the appendix.

(Continued on following page)

STATEMENT OF JURISDICTION

On April 17, 1989, the United States Circuit Court for the Third Circuit sitting in *banc* rendered the decision which petitioner requests that this Court review. The Third Circuit had previously granted respondents' Petition for Rehearing after a panel of the Circuit rendered its decision on October 24, 1988. The Third Circuit, by a majority of eight to five decided that petitioner is not entitled to Eleventh Amendment immunity from suit in federal court. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eleventh Amendment to the Constitution of the United States:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State.

2. 45 *U.S.C.* § 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and

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(Continued from previous page)

In addition, the Honorable G. Donald Haneke, U.S.M., prepared a Report and Recommendation which was relied upon by the Honorable Alfred M. Wolin, U.S.D.J., in the following cases: Ashraf Ghobrial, Sidney Kinnear, Dennis Martin and Kenneth G. Banta. That Report and Recommendation is reproduced in the appendix only once, in connection with the Guzman opinion rendered by Judge Bissell. (App. at 102a).

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

3. 45 *U.S.C* § 56:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

4. The New Jersey Public Transportation Act of 1979, *N.J.Stat.Ann.* 27:25-1 *et seq.* Pertinent portions of this Act are reproduced in the Appendix. (App. at 166a).

STATEMENT OF THE CASE

Petitioner, New Jersey Transit Rail Operations, Inc. is a subsidiary of New Jersey Transit Corporation, organized to run the commuter rail lines in the State of New Jersey. New Jersey Transit Corporation was established in the Executive Branch of State Government and allocated within the New Jersey Department of Transportation. In creating New Jersey Transit, the Legislature stated:

> The corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State. *N.J.Stat.Ann.* 27:25-4(a).

New Jersey Transit Corporation is the State mass transit agency exercising state-wide jurisdiction over bus and rail commuter transit. It is established within the executive branch of State government and is governed by a seven member board appointed by the Governor. *N.J.Stat.Ann.* 27:25-4(a) and (b). The Governor has the authority to veto any action taken by the board. *N.J.Stat.Ann.* 27:25-4(f).

Respondents are employees of Petitioner who have brought individual FELA (45 *U.S.C.* § 51) complaints in federal court against petitioner, alleging on-the-job injuries for which they are entitled to recovery. As a result of this Court's opinion in *Welch v. Department of Highways*

and Public Transportation, 483 *U.S.* 468 (1987), Petitioner filed a motion to dismiss in *Fitchik v. New Jersey Transit Rail Operations, Inc.* asserting lack of subject matter jurisdiction. The Honorable Alfred Wolin, U.S.D.J., granted petitioner's motion to dismiss. In the wake of that decision, the other New Jersey District Judges dismissed the complaints of the remaining twenty-three respondents based on lack of subject matter jurisdiction. These decisions are consistent with the holdings of every district judge who had addressed the issue of New Jersey Transit's Eleventh Amendment immunity and found that it was the *alter ego* of the State and entitled to immunity.*

Respondents filed timely appeals with the Third Circuit Court of Appeals. The appeals were consolidated by that court. On October 24, 1988, the Third Circuit entered judgment affirming the dismissals for lack of subject matter jurisdiction. Respondents filed a timely petition for

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* *See Dykman v. New Jersey Transit Rail Operations, Inc.*, 685 *F. Supp.* 79 (S.D.N.Y. 1988); *Johnson v. New Jersey Transit Rail Operations, Inc.*, Civ. No. 87-0173 (D.N.J. Mar. 15, 1988); *Cianfrani v. New Jersey Transit Bus Operations, Inc.*, Civ. No. 87-3707 (E.D. Pa. Aug. 11, 1987); *Worrell v. New Jersey Transit Bus Operations, Inc.*, Civ. No. 86-2075 (D.N.J. Jan. 29, 1987); *Williamson v. New Jersey Transit Rail Operations, Inc.*, Civ. No. 86-5353 (S.D.N.Y. Jan. 9, 1987); *Dunn v. New Jersey Transit Rail Operations, Inc.*, 681 *F. Supp.* 246 (D.N.J. 1987); *Brotherhood of Locomotive Engineers v. New Jersey Transit Rail Operations*, 608 *F. Supp.* 1216 (S.D.N.Y. 1985); *Brotinsky v. New Jersey Transit Auth.*, Civ. No. 85-0314 (E.D. Pa. Mar. 20, 1985); *Hightower v. New Jersey Transit Rail Operations, Inc.*, Civ. No. 84-1268 (D.N.J. Aug. 27, 1984); *Saddle River Tours Ltd. v. New Jersey Dep't of Transp.*, Civ. No. 83-1776 (D.N.J. Oct. 31, 1983), aff'd. 745 F.2d 48 (3d Cir. 1984); *Gibson-Homans Co. v. New Jersey Transit Corp.*, 560 *F. Supp.* 110 (D.N.J. 1982).

rehearing which was granted. On April 17, 1989, the Third Circuit, sitting in *banc*, overturned the panel's determination that Petitioner was the *alter ego* of the State and held that New Jersey Transit Corporation is not entitled to Eleventh Amendment immunity.

The majority opinion sought to apply the factors articulated in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert.* denied, 397 *U.S.* 948 (1970) to determine whether New Jersey Transit is the *alter ego* of the State. In so doing, it organized them into three categorical issues as follows:

(1) Whether the money to pay the judgment will be paid by the State;

(2) The status of the agency under state law;

(3) The degree of autonomy exercised by New Jersey Transit.

The majority found that because the State is not "obligated" to fund New Jersey Transit and thus, may not be obligated by virtue of a judgment against New Jersey Transit, then it is not the *alter ego* of the State. The majority held that this was the most important factor to consider and found New Jersey Transit not to be the *alter ego* of the State even though it found that the other factors when applied to New Jersey Transit militated in favor of *alter ego* status.

The dissenting opinion, in which five judges joined, weighed the same criteria and maintained that the majority's analysis of the funding issue ignored the practicalities of State operation of a commuter rail system. Specifically, the majority did not examine the functional relationship between New Jersey Transit's budget and the

State Treasury. Nor did the majority consider the control exercised by the State over all moneys received by New Jersey Transit, whether placed in the State's Treasury or not. The dissent, however, did consider these factors and would have held New Jersey Transit to be the *alter ego* of the State. After analyzing respondents' arguments that the State had waived its Eleventh Amendment immunity and finding them to be specious, the dissent would have upheld the dismissal of these actions from federal court.*

REASONS FOR GRANTING THE WRIT

THE HOLDING OF THE COURT BELOW THAT NEW JERSEY TRANSIT IS NOT THE *ALTER EGO* OF THE STATE FOR ELEVENTH AMENDMENT PURPOSES RAISES SUBSTANTIAL QUESTIONS OF SIGNIFICANCE CONCERNING *ALTER EGO* STATUS WHICH HAVE NEVER BEEN DECIDED BY THIS COURT AND WHICH HAVE BEEN DECIDED IN A CONFLICTING MANNER BY VARIOUS LOWER FEDERAL COURTS.

This petition presents several questions of substantial national importance regarding the jurisdiction of federal

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* The majority ignored the fundamental reality that the Legislature is not compelled to provide continued funding for any State program. As the dissent recognized, the obligation and commitment of the State is not so much measured by a legal obligation to fund, but the political and social commitment that the Legislature has made to the public that a public service will be available. Most recently, the Legislature, in the midst of a budget crisis, provided an additional $20 million in State aid to foreclose a major reduction in service by New Jersey Transit. This commitment to the public transcends any mechanistic obligation that the majority opinion felt was pivotal to its decision.

courts to entertain actions for damages brought against state entities. The flawed analysis of the Court below which relied on a technical analysis of tracing and giving legal significance to each dollar of income's source and which bank account will be used to pay judgments rather than examining the functional relationship between a State agency and the State Legislature and Treasury misapplied the directions of this Court in *Pennhurst State School and Hospital v. Halderman*, 465 *U.S.* 89 (1984), and is out of step with other lower courts' analyses of the *alter ego* status of state agencies. This Court has never addressed the question of how to determine when an agency of a single state constitutes the *alter ego* of the State for Eleventh Amendment purposes. This has led to a divergence in the lower courts concerning what factors to consider and the weight to accord each of them. Because of the nature of the Eleventh Amendment issue – *i.e.* each entity considered by the lower courts has a different circumstance and lies geographically within one Circuit – there by definition could be no direct conflict among the circuits. However, this Court should not skirt the issue simply because such a direct conflict does not exist, but rather should resolve the divergent approaches used by the circuits in evaluating this issue by setting forth criteria that all circuits can apply which are consistent with the principles of federalism underlying the Eleventh Amendment.

In rendering its decision below, the court erroneously decided the federal question of *alter ego* status in a manner which ignores the premise of the Eleventh Amendment which is intended to protect "the sovereignty of the

states and the sanctity of their treasuries." Note, *A Practical View of the Eleventh Amendment - Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO.L.J. 1473, 1474 (1973). As this Court has held, the Eleventh Amendment was adopted in recognition of the principle that States are sovereign within our system of government. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Using a mechanistic and constrictive approach in applying the source of funds criteria and according its resolution more weight than the other factors combined, and not considering its interaction with those other factors, the Third Circuit has elevated form over substance. It has relegated the issue of whether the agency is autonomous of State control to an insignificant consideration. Such an approach is inconsistent with the underlying purpose of the Eleventh Amendment and emasculates its impact.

As this Court has unequivocally stated, the Eleventh Amendment bars suit against state officials or agencies where the "state is the real, substantial party in interest." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). Obviously, when an entity is not autonomous of State control, the State is the real party in interest. Numerous decisions of other circuit courts of appeals have held the autonomy analysis to be the most determinitive criteria rather than simply considering exclusivity of funding by the State from general revenues in the context of whether state universities are immune from federal suit under the Eleventh Amendment. *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert.*

den. 469 *U.S.* 1113 (1985); *Clay v. Texas Women's University*, 728 F.2d 714 (5th Cir. 1984); *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 558 (5th Cir. 1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), aff'd *sub nom. Kush v. Rutledge*, 460 *U.S.* 719 (1983); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978); *Martin v. University of Louisville*, 541 F.2d 1171 (4th Cir. 1976); *Jagandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert.* den. 432 *U.S.* 910 (1977); *Prebble v. Broderick*, 535 F.2d 605 (10th Cir. 1976); *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975); *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971); *Walstad v. University of Minnesota Hospitals*, 442 F.2d 634 (8th Cir. 1971); *contra, Kovats v. Rutgers, The State University*, 882 F.2d 1303 (3d Cir. 1987); *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979). As stated in *Kashani v. Purdue University, supra*, "[t]he vast majority of cases considering the issue have found state universities to be protected by the Eleventh Amendment." 813 F.2d at 845; *see also Hall v. Medical College of Ohio at Toledo, supra*, 742 F.2d at 301. The circuit courts have held these universities to be immune even though they receive revenues, such as tuition, from sources other than state appropriations. For example, in *Kashani v. Purdue University, supra*, the court held that the issue of immunity does not depend merely on the sources of funding or on whether the state treasurer will physically write out a check to pay any judgment. As stated therein, the analysis must consider the entire relationship between the entity and the State, since:

> If a judgment were awarded against Purdue, the state treasury would not write out a check to Kashani. But in view of the fact that Purdue is by design dependent on state appropriations, which are evidently carefully geared through close oversight to meet the changing financial needs of the university, it is apparent that the payment would directly affect the state treasury. Indiana has not created an entity with a separate financial basis; it has created one that is dependent upon and functionally integrated with the state treasury. [813 F.2d at 846]

The decision below thus conflicts with the majority of decisions concerning the question of a state entity's immunity in that it fails to examine New Jersey Transit's dependency on State appropriations.

In an era where government has made a commitment to provide a myriad of services to the public, it has also had to contend with the question of how to fund such programs without enacting inequitable taxing programs. Legislatures, such as New Jersey's, have addressed this issue by balancing funding of programs between general tax revenues and user taxes. Programs so structured could not survive on user generated revenues alone and continue only because of the commitment by government to such programs through, in part, the provision of critically needed and substantial funding from general revenues. It is disingenuous to hold that because the Legislature chooses to affect a multi-type tax plan to support a program that that program is not State activity within the meaning of the Eleventh Amendment. While the source of funding is relevant, its relevance can only be measured in the context of the legislative scheme and the nature of the autonomy given to the governmental entity. To rule otherwise, is to hold that government

cannot generate public funds other than through general taxation without sacrificing its governmental status protected by the Eleventh Amendment.

By failing to accord the proper weight to the treatment of New Jersey Transit under state law and the degree of its autonomy – or more appropriately, the lack thereof – the court below ignored the spirit of the Eleventh Amendment. It is clear that the inquiry into whether the Eleventh Amendment applies to New Jersey Transit must be directed specifically to its own relationship within New Jersey state government. New Jersey Transit's Board comprises three *ex officio* State officers who serve at the will of the Governor, including the Commissioner of Transportation as Chairman, and the State Treasurer. Moreover, the other four members are appointed by the Governor and confirmed by the State Senate. *N.J.Stat.Ann.* 27:25-4(b). Accordingly, the composition of its Board demonstrates the substantial State supervision over New Jersey Transit's operations and financing. *Skehan v. State System of Higher Education*, 815 F.2d at 248; *see also Port Authority Police Benevolent Association v. Port Authority of N.Y.*, 819 F.2d 413, 417 (3d Cir. 1987) (holding that the fact that the twelve commissioners of the Port Authority of New York and New Jersey are appointed by the governors of each state and confirmed by the state legislatures is an indicia that the Authority is a direct agency of the states rather than an independent corporation).*

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* Paradoxically, the Third Circuit has recently upheld the Eleventh Amendment immunity of the Port Authority which is

(Continued on following page)

More importantly, any action of New Jersey Transit's Board is meaningless without the Governor's concurrence. The minutes of each New Jersey Transit Board meeting must be delivered to the Governor promptly. No action of the Board is final until the Governor approves the action, vetoes it, or allows 10 days to pass from the delivery of the minutes. *N.J.Stat.Ann.* 27:25-4(f). Thus New Jersey Transit has *no* autonomy from the New Jersey Governor. And, as in the *Skehan* case, New Jersey Transit must file financial reports with the State Department of Transportation, the Governor and the Legislature and is subject to audit by the State Auditor. *N.J.Stat.Ann.* 27:25-20. Furthermore, New Jersey Transit must consult with appropriate authorities regarding its compensation schedule and report on its salaries to the Legislature. *N.J.Stat.Ann.* 27:25-15. Thus, New Jersey Transit is inextricably a part of the New Jersey State government. That factor is particularly significant in evaluating New Jersey Transit's Eleventh Amendment status because the Supreme Court has recently emphasized that the Eleventh Amendment was adopted in recognition of the principle that states are sovereign within our system of government. *Pennhurst State School & Hospital v. Halderman*, 465 *U.S.* 89, 99-100 (1984). Because New Jersey Transit is not autonomous from the State of New Jersey it shares its Eleventh Amendment immunity.

(Continued from previous page)

totally supported by user revenues. *Leadbeater v. Port Authority-Trans Hudson Corp.*, ___ F.2d ___ (3d Cir. decided April 24, 1989).

Further, as evidence that New Jersey Transit operates as a State controlled entity is the fact that it, like the State is subject to the Contractual Liability Act, *N.J.Stat.Ann.* 59:13-1 *et seq.* (which applies only to State entities), state bidding laws, and the Administrative Procedure Act, *N.J.Stat.Ann.* 52:14B-2. *N.J.Stat.Ann.* 27:25-5(e), 25-11, 25-19. Even the majority below found that these factors were evidence of New Jersey Transit's lack of autonomy, but they failed to accord sufficient weight to New Jersey Transit's relationship to the State. The dissent recognized the true nature of the relationship between New Jersey Transit and the State when it stated:

> In sum, NJT has been granted many of the powers and privileges characteristic of a state, and specifically has been placed within the executive branch of the government. Of necessity, as a corporation transacting business in the commercial world, it enjoys many of the powers relative to operating a business. I believe, however, that overall the criteria decidedly favor alter ego status. Importantly, I think, the New Jersey courts applying the eleventh amendment alter ego analysis to NJT for other purposes have concluded that NJT is a public entity. (*Cf.* Skehan v. Board of Trustees, 538 F.2d 53, 62 (3d Cir. 1976) (in banc) holding dispositive a state court decision finding state colleges such as Bloomsburg State College to be agencies of the state for sovereign immunity purposes). On the whole, therefore, the status of NJT under state law favors alter ego status in this case. [Appendix at 45a].*

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* For treatment of New Jersey Transit by New Jersey state courts, *see Ross v. Transport of New Jersey*, 533 *A.*2d 12, 114 *N.J.* 136 (N.J. Sup. Ct. Feb. 1, 1989); *Travelers Insurance Co. v. Transport of New Jersey*, 497 *A.*2d 900, 204 *N.J. Super.* 63 (N.J. App. Div. 1985); *Transport of New Jersey v. Matos*, 495 *A.*2d 503, 202 *N.J. Super.* 571 (N.J. Law Div. 1985); *Dorn v. Transport of New Jersey*, 491 *A.*2d 1, 200 *N.J. Super.* 491 (App. Div. 1984).

This reasoning comports with the notion that the Eleventh Amendment is meant to protect our system of federalism.

New Jersey Transit enjoys no significant autonomy from the State of New Jersey. All property it owns is deemed to be State property and all of its funds are by definition public monies since they may be placed with the New Jersey Cash Management Fund. *Worrell v. New Jersey Transit Bus Operations*, Civ. No. 86-2075 (D.N.J. Jan. 29, 1987); *N.J.Stat.Ann.* 27:25-16; *N.J.Stat.Ann.* 27:25-5(p). It is not a political subdivision, such as a city or county as described in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 *U.S.* 274 (1977), but a state agency with statewide authority and a specifically defined purpose enunciated by the New Jersey Legislature. Accordingly, New Jersey Transit is the *alter ego* of the State of New Jersey entitled to assert its Eleventh Amendment immunity from FELA lawsuits brought in federal court.

The Legislature has declared that New Jersey Transit performs "an essential public service which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers." *N.J.S.A.* 27:25-2(a). It is also recognized that "it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system." *N.J.S.A.* 27:25-2(b). New Jersey Transit is constituted as an instrumentality of the State. *N.J.S.A.* 27:25-4.

Unlike some instrumentalities who act independently of State government, who receive no funds from the State

and who address a singular function also offered by other public and private entities with no regulatory authority, New Jersey Transit is charged with coordinating *all* mass transit services in the State and exercises substantial regulatory authority. While there may be some limited mass transit services offered by private or local governmental agencies, they must be coordinated by and generally receive assistance from New Jersey Transit. Furthermore, New Jersey Transit provides the only passenger rail service in New Jersey. Thus, it is clear that New Jersey Transit has all the characteristics of a State governmental agency exercising statewide authority, providing the general public with essential services and making governmental policy decisions regarding mass transit.

The fundamental flaw in the decision below is its emphasis on the source of revenues received by New Jersey Transit. The court reasoned that since New Jersey Transit has funds from passenger fares and federal subsidies, the State may not be required to pay any judgment. In the majority's view below, any increase in appropriated funds made by the Legislature as a result of a judgment against New Jersey Transit would not be mandatory, thus New Jersey Transit could not be considered the *alter ego* of the State for purposes of the Eleventh Amendment. Initially, it should be recognized that this analysis presumes that because the source of funds is not State appropriations, the funds are not "State" funds. However, given the State status of New Jersey Transit, including the control exercised over it by the Governor, State Treasurer and Legislature, any funds of New Jersey Transit should be deemed "State" funds. In fact, the Legislature takes into account all revenues of New Jersey

Transit when making decisions regarding its appropriations, including the user fees denominated as fare box revenues. The type of mechanistic analysis followed by the court below would preclude many State departments from claiming the protection of the Eleventh Amendment because they too collect user fees or federal subsidies.

Had the court properly analyzed the relationship between New Jersey Transit and the State of New Jersey, a clear linkage between appropriated and non-appropriated funds would have been found such that "the effect of . . . any judgment against the [school] [would be] a liability payable from the state treasury." *Hall v. Medical College of Ohio at Toledo, supra,* 742 F.2d at 305. In order to ensure that New Jersey Transit is able to satisfy its "public and essential governmental functions" and, in recognition of the declared legislative finding that "it is the *responsibility* of the State to establish and provide for the operation and improvement of a coherent public transportation system," *N.J.Stat.Ann.* 27:25-2(b) (emphasis added), the State Legislature annually appropriates the money necessary to fund the difference between New Jersey Transit's total operating budget and all its anticipated revenues from fares and federal sources. *See, e.g., L.* 1987, *c.* 154; *L.* 1988, *c.* 9; *L.* 1988, *c.* 47 (State of New Jersey Appropriations Bills and Supplemental Appropriations for Fiscal Years 1987-88 and 1988-89). Significantly, the Supplemental Appropriations Bill of 1988 adopted when New Jersey Transit faced a revenue shortfall in 1988 provides that

> The amount hereinabove shall be allocated by the Director of the Division of Budget and Accounting contingent upon the adoption of a formal resolution

> by the board of New Jersey Transit Corporation that effectively reduces the total amount of any proposed bu[s] and rail fare increases for the fiscal year ending June 30, 1987, as compared with the proposed fare increase levels that were submitted to the board at its meeting on March 25, 1986, and which proposed fare increases were the subject of a series of public hearings conducted by the corporation in April, 1986.
>
> New Jersey Transit Corporation shall explore opportunities to achieve cost savings and shall report to the Assembly Transportation, Communications and High Technology Committee and the Senate Transportation and Communications Committee, or their successors, on these cost savings procedures within six months of the enactment of this legislation [*L.* 1988, *c.* 9.]

Whether or not a State agency is the *alter ego* of the State should not depend on the bookkeeping device chosen by the Legislature concerning which bank account is to be the repository of funds collected by a State agency. As in *Hall v. Medical College of Ohio at Toledo, supra,* the New Jersey Legislature thus permits New Jersey Transit to retain revenues rather than pay them into the treasury and then be appropriated back as needed "but it could just as easily amend that statute to require the converse." 742 *F.*2d at 304.

Thus, any judgment paid out of New Jersey Transit's operating budget, which includes both direct State appropriations and anticipated revenues derived from passenger fares and federal subsidies would directly affect the State Treasury. Since all unrestricted revenues are considered by the Legislature in determining the size of the direct appropriation, any payment from other sources of revenue while "not literally out of the general treasury . . . would directly deplete the funds otherwise utilized

by . . . non-autonomous, nonprofit state agencies in performing their important governmental non-proprietary functions" and would accordingly be barred by the Eleventh Amendment. *Wade v. Mississippi Co-op Extension Service*, 424 *F. Supp.* 1242, 1256-57 (N.D. Miss. 1976); *see Hall v. Medical College of Ohio at Toledo, supra.* The court below, however, failed to analyze in depth the financial relationship between New Jersey Transit and the State.

For example, as the dissent below recognized, New Jersey Transit has other sources of funds, but it cannot raise those revenues free from State control. Specifically, because any action of the New Jersey Transit Board is subject to the veto of the Governor, *N.J.Stat.Ann.* 27:25-4(f), New Jersey Transit is not given the discretion, free of State control, to raise fares or take other actions to raise funds. To the extent that the State does not permit New Jersey Transit to raise additional revenue or decrease service any added services must be made up from State appropriations. *See Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304-5 (6th Cir. 1984), *cert.* den. 469 *U.S.* 1113 (1985).

Thus, as with any other State agency that has additional expenses beyond available funds, the State, not New Jersey Transit, must decide whether to cut service, increase appropriations or find some other source of revenue. It is this State control over how the expenses will be paid that is important for the purpose of an Eleventh Amendment analysis. As Judge Stern stated in *Gibson-Homans*, "the fiscal realities of operating a public transportation system coupled with the inability of the corporation to incur debt or raise money through sale of its own bonds, dictates the continuation of appropriations of

state funds to New Jersey Transit." 560 *F. Supp.* at 113-14. The court completely ignored the reality of funding state departments, thus arriving at the finding that a judgment against petitioner would not "necessarily" be paid by the State. The court chose to believe that petitioner could simply raise fares to cover federal judgments. This, of course, overlooks the very real relationship between ridership levels and fare increases, and New Jersey Transit's inability to unilaterally raise fares or decrease service. The New Jersey legislature has mandated that an efficient transportation system is an essential state function. *N.J.Stat.Ann.* 27:25-2 and 25-4(a). Thus, it is evident, as the dissent below found, that any money judgment will impinge upon the state fisc.

The court's analysis below ignored reality since no state is likely to allow the existence of its public transportation system to be placed in jeopardy as a result of a substantial judgment. Rather, should a judgment be rendered against New Jersey Transit which endangers its ability to provide essential transportation services, the State will most likely appropriate the funds necessary to continue operations – just as it has in the past when anticipated revenues have not materialized. The court's holding will impede government from adopting imaginative and innovative solutions to meeting increasing public demands on State government, which enhance the efficiency of operations and explore multiple and equitable means of raising public monies for these programs. That the State has the alternative, unpalatable choice of discontinuing commuter bus and rail operations should have no bearing on whether New Jersey Transit is the *alter ego* of the State. If the decision below is allowed to

stand, not only will New Jersey Transit – and New Jersey itself – be exposed to liability prohibited by the Eleventh Amendment but other courts may adopt the flawed reasoning, denying immunity to other state entities otherwise entitled to it. In view of the public importance of this issue, petitioner urges that review by this Court is imperative.

CONCLUSION

For the above stated reasons, it is respectfully submitted that this petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Attorney General of New Jersey
Attorney for New Jersey Transit Rail Operations, Inc.

By: /s/ Emerald L. Erickson
EMERALD L. ERICKSON
Deputy Attorney General
Counsel of Record

ROBERT H. STOLOFF
Assistant Attorney General
Of Counsel

Dated: July 17, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 88-5142, 88-5270, 88-5320/21/22/23/24/25,
88-5327/28/29, 88-5336/37/38, 88-5371, 88-5373/74,
88-5376/77/78, 88-5383, 88-5559, 88-5682, 88-5961

NO. 88-5142

JOSEPH P. FITCHIK,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.
Appellee

v.

NON DESTRUCTIVE TESTING CORP.,
Third-Party Defendants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-3080)

JOSEPH A. COFFEY, JR., ESQ.
LAWRENCE A. KATZ, ESQ. (Argued)
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Coffey & Kaye
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Bala Cynwyd, PA 19004
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MICHAEL R. CLANCY
Deputy Attorney General

GRACE A. DENNIGAN
Deputy Attorney General
EMERALD L. ERICKSON (Argued)
Deputy Attorney General
Attorneys for Appellee

NO. 88-5270

LINDA A. DEGIROLAMO,
Appellant

v.

NEW JERSEY TRANSIT AUTHORITY
d/b/a NEW JERSEY TRANSIT,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (TRENTON)
(D.C. Civ. No. 86-3901)

NO. 88-5320

FELIX E. GUZMAN,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0799)

NO. 88-5321

SIDNEY KINNEAR,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0802)

NO. 88-5322

KENNETH G. BANTA,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

v.

EVERETTE G. WHITENOUR, CHRISTOPHER
MIDDLETON, JUSTINE SMITH, AND TOWN
OF DOVER,
Third Party Defendants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-3413)

NO. 88-5323

WILLIAM ROCKWELL,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (TRENTON)
(D.C. Civ. No. 84-4214)

NO. 88-5324

ROBERT K. HEATON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-4829)

NO. 88-5325

WILLIAM P. McKENNA,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1534)

NO. 88-5327

CRAIG A. CONLON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-4689)

NO. 88-5328

LAURENCE O'HALLORAN,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-2266)

NO. 88-5329

DENNIS MARTIN,
Appellant

v.

NEW JERSEY TRANSIT CORPORATION &
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-4937)

NO. 88-5336

ROBERT G. STOCKER, SR.,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 84-4244)

NO. 88-5337

CLIFFORD E. WILLIAMSON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1322)

NO. 88-5338

DAVID J. CHWASZCZEWSKI,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1535)

NO. 88-5371

PHILIP ROXAS,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-2222)

NO. 88-5373

PATRICK J. MUELLER,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-0932)

NO. 88-5374

JOSEPH L. DUFFY,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1284)

NO. 88-5376

EDWARD J. FLILLER,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1862)

NO. 88-5377

JAMES C. HARDEN, JR.,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-2187)

NO. 88-5378

LYNN R. STIGLIANO
Personal Representative of the Estate
of John Paul Stigliano, Deceased,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-2330)

NO. 88-5383

LOUIS D. ELLIS,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0378)

NO. 88-5559

ASHRAF GHOBRIAL,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0584)

NO. 88-5682

WILLIAM C. HAZELTON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-4854)

NO. 88-5961

GEORGE FEATHERMAN,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0583)

Argued July 19, 1988
Before: Higginbotham, Becker, and Rosenn,
Circuit Judges
Reargued In Banc January 30, 1989
Before: Gibbons, *Chief Judge*, Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, and Rosenn,
Circuit Judges

(Filed April 17, 1989)

OPINION OF THE COURT

BECKER, *Circuit Judge.*

These consolidated appeals require us to resolve the question whether the eleventh amendment precludes the plaintiff-appellants, railroad workers who sustained personal injuries in the course of their employment, from instituting compensatory damage actions in federal court under the Federal Employers' Liability Act ("FELA"), 45

U.S.C. §§ 51-60 (1982), against the defendant-appellee New Jersey Transit Rail Operations, Inc. ("NJTRO"). This opinion will address the case of the lead plaintiff, Joseph P. Fitchik, a NJTRO conductor who was seriously injured when his train struck a track guard. Thereafter, Fitchik sued NJTRO in the district court for the District of New Jersey. The district court granted NJTRO's motion to dismiss Fitchik's complaint on the ground that NJTRO was immune from suit under the eleventh amendment, and Fitchik appeals. We consider Fitchik's arguments as representative of those asserted by each of the plaintiffs whose appeals have been consolidated.

Although the eleventh amendment issue is presented here in a number of aspects, the first, dispositive, question is whether NJTRO, which is a wholly owned subsidiary of New Jersey Transit Corporation ("NJT"), is the alter ego of New Jersey. A state agency is entitled to immunity from suit in a federal court under the eleventh amendment when a judgment against it "would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). If NJTRO is not an arm of the state, eleventh amendment immunity will not attach. For the reasons that follow, we conclude that NJTRO is not the alter ego of New Jersey. We therefore reverse.

I. ELEVENTH AMENDMENT BACKGROUND

Fitchik's contention that NJTRO is not the alter ego of New Jersey relies principally upon our decisions in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969),

cert. denied, 397 U.S. 948 (1970), and *Kovats v. Rutgers, the State University*, 822 F.2d 1303 (3d Cir. 1987). The district court dismissed Fitchik's complaint on the grounds that NJTRO was the alter ego of the state; that in enacting the FELA and the Federal Safety Appliance Act, Congress did not manifest the unmistakable statutory language necessary to abrogate the states' immunity from suit in federal court; and that New Jersey had not waived its immunity. *See* Dist. Ct. Op. at 8-9 (Jan. 26 1988) (citing *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468 (1987)). Our review of defendant's entitlement to eleventh amendment immunity (including the threshold alter ego question) is plenary. *Skehan v. State System of Higher Education*, 815 F.2d 244, 246 (3d Cir. 1987).[1]

> The eleventh amendment provides:
>
> The judicial power of the United Sates shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite the amendment's language, the Supreme Court has consistently interpreted it to immunize an unconsenting state " 'from suits brought in federal courts by her own citizens as well as by citizens of another state.' "

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[1] Although Fitchik did not argue the alter ego issue in the district court, nor assert it as a ground for reversal in his opening brief to this court, we must nonetheless consider it for it implicates our jurisdiction (since the 11th amendment limits the reach of the federal courts). *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). We must, of course, independently consider our jurisdiction. *Cf. Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984) (quoting *Employees v. Missouri Dept. of Pub. Health and Welfare*, 411 U.S. 279, 280 (1973)). A suit may be barred by the eleventh amendment even though a state is not named a party to the action, as long as the state is the real party in interest. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The court has therefore attempted on several occasions to determine just when a suit against an entity is actually a suit against the state itself.

In *Pennhurst*, for example, the Court asserted that the state is the real party in interest when " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " 465 U.S. at 101 n.11 (citation omitted). This court has formulated a more specific and comprehensive test to determine whether eleventh amendment immunity extends to an entity:

> '[L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is

> immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

Urbano, 415 F.2d at 251-52.

Several of the *Urbano* factors are interrelated. For clarity's sake, we divide the nine *Urbano* factors into three larger questions as follows:

(1) Whether the money that would pay the judgment would come from the state (this includes three of the *Urbano* factors – whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);

(2) The status of the agency under state law (this includes four factors – how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and

(3) What degree of autonomy the agency has.[2]

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[2] One of the *Urbano* factors – whether the agency exercises a governmental or proprietary function – is no longer a valid criterion in light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Garcia* rejected the governmental-proprietary distinction as a basis for determining whether states must comply with federal legislation enacted pursuant to the commerce clause. *Id.* at 546-47. The Supreme Court held that the line drawing required by the distinction was unworkable, and that the inquiry rested upon a conception of the appropriate role of state government that is not grounded in the Constitution. *Id.* at 543-54. Concomitantly, we do not see how this factor could be germane to eleventh amendment analysis, hence we will not address it.

We turn to our evaluation of these factors. Our record consists of an extensive set of stipulated facts. As will be seen *infra*, these factors are not weighed evenly in striking the balance.

II. DISCUSSION

A. *Funding*.

Although no single *Urbano* factor is dispositive, the most important is whether any judgment would be paid from the state treasury. *Urbano* itself calls this "the most significant factor," 415 F.2d at 251, and this conclusion is supported by the Supreme Court's identification of the amendment's central goal as the prevention of federal court judgments that must be paid out of the state's treasury. *See generally, Edelman v. Jordan*, 415 U.S. 651 (1974). For example, federal litigants cannot get damages from the state treasury by suing a state officer in his or her official capacity, *see Edelman*, 415 U.S. at 663-66, although suits against officers for injunctive relief, which affect the state's discretion to pursue its own policies, are permitted. *See Ex parte Young*, 209 U.S. 123 (1908).

We focus here on the funds of NJTRO's parent. Since NJTRO is a wholly owned subsidiary of NJT, any eleventh amendment immunity conferred upon NJTRO would be derivative of that possessed by NJT. *See Kovats*, 822 F.2d at 1306. The following are the relevant financials. During the year ending June 30, 1987,

1) passenger fares accounted for approximately $289 million of $313 million in operating revenues (New Jersey Transit 1987 Annual Report (hereinafter "Annual Report"), app. at 69);

2) NJT received approximately $49 million in federal and $167 million in state operating subsidies (*id.*);

3) federal sources had provided approximately $944 million of a total of $1.3 billion of the balance of contributed capital, whereas $392 million was obtained from a combination of state *and* local sources (*id.* at 70-71).

Additionally, NJT is self-insured, has set aside funding to meet its liabilities for injury and damage claims, and has the authority to purchase liability insurance (*id.* at 73). Moreover, NJT issued grant anticipation notes in 1985 and 1986, and after June 30, 1987, it entered in to a line of credit arrangement which permits it to borrow funds (*id.* at 76).

NJTRO points to the following facts to support its contention that NJT's money is in fact the state's money and thus that any judgment against NJT constitutes a judgment against the state: (1) New Jersey gives a significant amount of money to NJT; and (2) NJT is entitled to invest its money in the state Cash Management Fund ("CMF") and monies in the CMF are "public monies." NJTRO also argues that New Jersey has dominion over NJT's money because the Governor of New Jersey has veto power over NJT's operation, and thus can influence NJT's revenue raising efforts. We do not see this fact as indicating state ownership of the money already in NJT's accounts. We think it, instead, to be relevant to the third factor we discuss, NJT's autonomy, and, consequently, we discuss it below. *See infra* Typescript at 28-29.

The most striking financial detail is that NJT's money does *not* come predominantly from the state. New Jersey provides less than 33% of NJT's operating funds. *See* Annual Report at 30, App. at 65, 69. But even putting that

significant fact aside, we note that the fact that an entity derives some of its income from the state does not mean that it is entitled to partake of the state's immunity. "[T]he nature of the state's obligation to contribute may be more important than the size of the contribution." *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). What is significant is whether the money that pays the fine will come from the state treasury rather than the agency's funds, or (alternatively) whether the state must reimburse the agency and thus effectively pay the debt.

Strong support for Fitchik's position that NJT is not the alter ego of the state is found in *Kovats*, 822 F.2d 1303, 1309, in which we held that a judgment against Rutgers is not a judgment against the state. In considering the funding issue, we observed that Rutgers had four distinct sources of income: auxiliary income from dining hall and room rental fees; restricted income from governmental and private groups; general university income from tuition, fees and investments; and state appropriations. *Id.* at 1308. Rutgers' use of the first two revenue sources was restricted to the service or program that engendered the income. The remaining sources, which comprised approximately 72% of the university's total income, were commingled in a general operating account used to fund daily operations. State appropriations constituted between 50 and 70% of the general operating account. *Id.* Importantly, the state was under no obligation to pay Rutgers' debts or to reimburse it for any judgments.

The facts here are just as strong as *Kovats* for the proposition that NJT is not the alter ego of the state. Like the situation in *Kovats*, New Jersey is under no obligation to pay NJT's debts or reimburse NJT for judgments that it

pays. Indeed, New Jersey has specifically disclaimed any liability for NJT's debts. *See* N.J. Stat. Ann. § 27:25-17 (West Supp. 1988). Thus, "[a]ny increase in [NJT's] state appropriation as a result of a judgment against [NJT] will be entirely the result of discretionary action by the state." *Kovats*, 822 F.2d at 1309. Although New Jersey might appropriate funds to NJT to meet any shortfall caused by judgments against NJT, such voluntary payments by a state do not trigger sovereign immunity. *See id.*; *Blake*, 612 F.2d at 726 (holding that "an ancillary effect on the state treasury will not create an eleventh amendment jurisdictional bar").

Furthermore, it is not clear that NJT would need to request funds from the state coffers in order to meet shortfalls caused by adverse judgments. NJT gets most of its money from fares. *See* Annual Report at 30. Just like a private railroad, NJT can raise revenues by raising fares, thus spreading the costs of accidents among its users. *See* N.J. Stat. Ann. § 27:25-5(n). Alternatively, NJT could cover any shortfall by reducing its expenses or capital budget. In this regard, we also note that NJT gets a far higher percentage of its income from non-state sources than Rutgers.

Moreover, judgments against NJT will not necessarily lead to shortfalls. NJT is authorized to purchase liability insurance. N.J. Stat. Ann. § 27:25-5(r). It is self-insured for up to three million dollars per occurrence for rail operations, subject to additional participation for larger losses. *See* Annual Report at 34. Thus NJT can meet at least some of the claims against it with the money it has set aside to cover such liabilities, and to that considerable extent need not ask the state or anyone else for help.

Nor are we persuaded by the fact that NJT, unlike Rutgers, is entitled to invest its funds in the CMF, or the fact that funds contained in the CMF are, by definition, "public moneys." N.J. Stat. Ann. § 52:18A-90.4. That a statute terms property "public" does not mean that it constitutes the state's property for purposes of the eleventh amendment. "[C]ounties, municipalities and school districts" are allowed to deposit moneys in the CMF, *id.*, but it is crystal clear that these entities are not entitled to immunity from suit in federal court. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280-81 (1977).[3] The designation of the money as "public" simply does not answer the question of who has dominion over the money in NJT's accounts.

As evidence of state dominion over NJT's money, NJTRO points to the state's control of monies invested in the CMF. *See* Appellee's Supp. Br. at 10. We find this evidence inadequate for three reasons. First, NJT is not obliged to invest in the CMF. Because the state only gets control of the investments with NJT's consent, control in

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[3] Indeed, the Supreme Court has held since 1890 that counties and similar political subdivisions of the state are not entitled to eleventh amendment immunity, despite the fact that they exercise state power and receive significant amounts of money from the state. *See Lincoln County v. Luning*, 133 U.S. 529 (1890); *see also Workman v. New York*, 179 U.S. 552, 563-66 (1900) (holding that cities are not entitled to eleventh amendment immunity); *Mt. Healthy*, 429 U.S. at 280-81 (holding that school districts are not entitled to eleventh amendment immunity). Thus, from the time that it was construed as a grant of sovereign immunity, the eleventh amendment has only applied to bar suits which are actually or effectively against the state itself. As this opinion explains, that is not the case here.

the first instance remains with NJT. *See* N.J. Stat. Ann. § 27:25-5(p). Second, control is only significant to the funding factor if it indicates ownership.[4] Since New Jersey does not have a financial interest that would be directly and adversely affected by the fund's diminution, the funds in the CMF do not belong to New Jersey, notwithstanding the fact that New Jersey makes investment decisions about the money in the CMF. Third, the control that New Jersey exercises over NJT's money is identical to the control it has over the county, city, and school district funds in the CMF. Yet, as noted above, it is clear that those entities are subject to suit in federal court.[5]

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[4] In *Kovats* this Court did describe the earlier case of *Blake*, 612 F.2d 718, as making the issue of immunity depend in part on the state's "control" over a fund from which a judgment might be paid. 822 F.2d at 1308-09. Significantly, however, what *Kovats* referred to as the "control" issue in *Blake* was the question whether money set aside in a separate account in the state treasury was actually the state's money – either because the state had an obligation to replace it, because there were insufficient funds in the account and the state would be obligated to pay any judgment directly, or because the state generally treated the funds as its own. 612 F.2d 723-24. Thus the issue in *Blake* was not whether the state had influence over the investment of some of the agency's money, but whether that money in fact belonged to the state.

[5] Nor does the fact that judgments against Rutgers could sometimes be satisfied from segregated accounts that contain no state funds, while NJT does not segregate its accounts, provide a reason to accord NJT sovereign immunity. The commingling of the funds does not affect New Jersey's obligation (or rather non-obligation) to replace the money that NJT

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Therefore, with respect to the funding issue, we find this case to be controlled by *Kovats*. Both Rutgers and NJT were created by statute to serve a public purpose, and both receive significant funding from the state. But in neither case has New Jersey obligated itself to pay the entity's debts. Thus judgments against both Rutgers and NJT would be paid out of their own funds, rather than the public fisc. Furthermore, both Rutgers and NJT can turn to sources besides state appropriations to meet shortfalls, and NJT also has insurance to help offset its losses. Finally, neither the fact that NJT may invest its funds in the CMF, nor the fact that it does not segregate the funds it gets from state appropriations, provides a meaningful distinction between NJT and Rutgers. Just as it did in *Kovats*, the funding factor here weighs strongly against NJT's claim that it is entitled to immunity from suit in federal court.

B. *Status Under State Law.*

The second basic *Urbano* question is whether state law treats an agency as independent, or as a surrogate for

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spends. And it does not indicate any greater control by New Jersey of the money in the accounts. Furthermore, the bulk of the funds in the account were provided by non-state sources; payments from the fund up to the amount received from other sources (plus interest) can be considered as coming from monies that NJT obtained from the other sources, and thus do not fall under the rubric of state-provided funds. And, in any case, in light of the discussion above, *see supra* typescript at 20-22, even if some of the money that pays the judgments came from state appropriations, that does not entitle NJT to sovereign immunity.

the state. NJT's capacity to sue and its immunities from state taxation are best considered as part of this inquiry because they help provide a complete picture of New Jersey's treatment of NJT. New Jersey law on the area is checkered; some factors counsel toward according NJT sovereign immunity, while others counsel against. Because NJT's status under New Jersey law is uncertain, the analysis of this factor does not significantly help in determining whether NJT is entitled to immunity from suit in federal court. *Cf. Kovats*, 822 F.2d at 1310 (finding Rutgers' status under New Jersey law to be too indeterminate to aid in the sovereign immunity inquiry).

There is some indication that New Jersey law considers NJT to be an arm of the state. NJT was created by the New Jersey Public Transportation Act of 1979 ("the Act") as the successor to the Commuter Operating Agency of the New Jersey Department of Transportation. N.J. Stat. Ann. § 27:25-24. (West Supp. 1988). NJT's operating property, plant and equipment were acquired by the state of New Jersey and subsequently transferred to the corporation at cost. New Jersey law declares that NJT was created to serve a "public purpose." N.J. Stat. Ann. § 27.25-2. *But see* n.2, *supra*.

More importantly, NJT is subject to the New Jersey Tort Claims Act, *Transport of New Jersey v. Matos*, 202 N.J. Super. 571, 573, 495 A.2d 503, 505 (N.J. Super. Ct. Law Div. 1985); is immune from state property tax, N.J. Stat. Ann. § 27:25-16; has the power of eminent domain, *id*, at § 27:25-13(a) and (c); and is subject to the strictures of the state administrative procedure act, *id*. § 27:25-5(e). Further, the New Jersey Supreme Court has declared NJT to

be a "public" entity, although not in the context of sovereign immunity. See Ross v. Transport of New Jersey, No. A-13, slip op. at 3 (N.J. Sup. Ct. Feb 1, 1989) (NJT bus operations not required to carry uninsured motorist coverage).

We must be wary of taking these arguments too far, however. For example, the New Jersey Tort Claims Act, applies to New Jersey municipalities and counties as well, *see* N.J. Stat. Ann. 59:1-3 (West Supp. 1988), and those entities are not accorded sovereign immunity. *See supra,* typescript at 23, n.3. Indeed, Rutgers was similarly subject to the New Jersey Tort Claims Act, and immune from state property tax. *See Kovats,* 822 F.2d at 1311. And the fact that NJT has the power of eminent domain, and thus exercises "a slice of state power" does not mean that it is necessarily entitled to eleventh amendment immunity. *See Lake Country Estates,* 440 U.S. at 401. Significantly, New Jersey counties and municipalities also have the power of eminent domain, *see* N.J. Stat. Ann. §§ 40:66A-31.4a, 20:3-47, 40:56-7, 40:56-8 (1967 & Supp. 1988), as do privately owned public utilities of every kind. *See id.* § 48:3-17.6.

On the other side of the equation, New Jersey has given power to NJT in two spheres that *Urbano* identified as indicative that an agency is not entitled to sovereign immunity. New Jersey has accorded NJT a separate corporate existence, N.J. Stat. Ann. § 27:25-4(a), and has given NJT the ability to sue and be sued in its own right. *Id.* at § 27:25-5(a). New Jersey law allows NJT to enter into contracts on its own behalf, *id.* at §§ 27:25-5(r) and (v), and purchase land, stock, equipment, and personal property. *Id* at §§ 27:25-13, 25-5(u), 25-10, and 25-5(j). And

the New Jersey Supreme Court has held that the University of Medicine and Dentistry of New Jersey, a state university created by statutes similar to the ones that created NJT, is not entitled to eleventh amendment immunity. *See Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988). This evinces some reluctance on the part of the New Jersey courts to accord immunity to agencies whose status under New Jersey statutes is ambiguous.

On balance, the "status under state law" factors seem to tilt in favor of NJTRO's contention that NJTRO is entitled to sovereign immunity, but only slightly.

C. *Autonomy.*

Turning to the final *Urbano* consideration, the degree of NJT's autonomy from the state, we conclude that, in terms of autonomy, NJT lies somewhere between Rutgers and the Port Authority of New York and New Jersey–an agency which this Court declared to be entitled to eleventh amendment immunity. *See Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct.344 (1987).

In favor of its autonomy, NJT is governed by its own board of directors and is "independent of any supervision or control by the department [of transportation] or by any body or officer thereof." N.J. Stat. Ann. § 27:25-4(a) and (b). Moreover, the board has significant powers. Among other things, it can cause the corporation to enter contracts, bring lawsuits, purchase and sell property, buy insurance, structure the corporation's internal management, and set and collect fares. *See* N.J. Stat. Ann.

27:25-5. Furthermore, only the board can initiate action by NJT. The Governor and other members of New Jersey's executive branch have no such authority.

On the other hand, three out of seven of the board members are required to be members of the executive branch, and the Governor has veto power over the board's actions. N.J. Stat. Ann. § 27:25-4. As NJTRO correctly points out, these facts make the case distinguishable from *Kovats*. But this case is also distinguishable from cases in which agencies were found to be alter egos of the state. In *Port Authority*, for example, in addition to being subject to gubernatorial veto, the agency could not embark on new projects without the authorization of both the New York and New Jersey legislatures. 819 F.2d at 417.

NJT falls between the cracks of the prior cases. Although not "highly autonomous" like *Rutgers*, NJT is significantly autonomous. Since the degree of control by the governor is fairly substantial, we think that this factor counsels slightly in favor of according immunity to NJT.

D. *Striking the Balance.*

Since 1890, the eleventh amendment has been construed to entitle states to immunity from suit in federal court. *Hans v. Louisiana*, 134 U.S. 1 (1890). The amendment is intended to provide a partial solution to "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279, 294 (1973) (Marshall, J. concurring). The amendment's general purpose is to foster the states' autonomy.

See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984). This court has attempted to effectuate the amendment's purpose by application of the factors listed in *Urbano*. In this case, the most important *Urbano* factor – whether the judgment would be paid by state funds – provides extremely strong indication that NJT is not the alter ego of New Jersey. The other factors – NJT's treatment under state law, and its degree of autonomy – provide only weak support for the conclusion that NJT is New Jersey's alter ego.

On balance, therefore, we conclude that NJT is not the alter ego of New Jersey, and thus that its subsidiary, NJTRO, is not entitled to eleventh amendment immunity.[6] The judgement of the district court will therefore be reversed and the consolidated cases will be remanded for pretrial proceedings and trial.

ROSENN, *Circuit Judge*, Dissenting.

The majority holds that NJTRO is so independent of the state as to not merit its eleventh amendment immunity. The majority reaches this result by relying, in essence, only on its analysis of one of the *Urbano* factors, the impact of a judgment against NJTRO on the treasury of the State of New Jersey. This court, however, has stated that funding alone does not resolve the immunity issue. Whether payment is from the state treasury or from an

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[6] Because we so conclude, we need not reach the issue of whether Congress has abrogated NJT's sovereign immunity, or whether New Jersey has waived it.

independent entity, although important, is not dispositive. We so held in *Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987). Payment is only meaningful in light of the entity's other attributes. *Blake v. Kline*, 612 F.2d 718, 724 (3d Cir.), *cert. denied*, 447 U.S. 921 (1980). "If the state structures an entity in such a way that the other relevant criteria indicate it to be an arm of the state, then immunity may be retained even where damage awards are funded by the state at the state's discretion." *Kovats v. Rutgers, the State University*, 822 F.2d 1303, 1310 (3d Cir. 1987)(footnote omitted).

Although NJTRO is unquestionably something of a hybrid, I believe that overall the factors developed in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), relative to this eleventh amendment inquiry weigh in favor of holding NJTRO to be the alter ego of the state. I therefore respectfully dissent.

Before commencing with my analysis, I observe that NJTRO is a wholly owned subsidiary of New Jersey Transit Corporation (NJT). Therefore, any eleventh amendment immunity conferred upon NJTRO would be derivative of that possessed by NJT. *See Kovats*, 822 F.2d at 1306.

I. FUNDING

The majority combines three of the *Urbano* factors relating to finance under the general heading of "funding": whether payment will come from the state treasury; whether the entity has the power to satisfy the judgment;

and whether the sovereign has immunized itself from responsibility for the entity's debts. Although I take no exception to that analytic approach, I cannot agree that in the end the funding factor is determinative of the alter ego status.

As a preliminary matter, I quite agree with the majority that "the nature of the state's obligation to contribute may be more important than the size of the contribution." Maj. op. at 20 (quoting *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980)). In fiscal year 1987 New Jersey contributed $167 million to NJT, representing about thirty-three percent of NJT's operating funds. Although this may indeed be a "significant fact," Maj. op. at 20, what is even more significant is the extent of the state's commitment to NJT. For, as illustrated by our holding in *Port Authority*, 819 F.2d at 416-18, even an entity that has become entirely independent of the state financially may nevertheless share in the state's sovereign immunity if its statutory structure and history demonstrate state involvement with and obligation to the entity.

The majority makes three agruments in support of its conclusion that the funding factor weighs against NJT's alter ego status. First, it argues, because New Jersey has statutorily insulated itself from liability for NJT's debts, any increase in state appropriations to NJT to cover judgments against it would be wholly discretionary on the state's part. Maj. op. at 21. Second, NJT does not lack the power to pay judgments against it because it can raise fares, cut its expenses or capital budget, or rely on liability insurance. Maj. op. at 22. Finally, simply because NJT is permitted to invest its money in the state's Cash Management Fund (CMF) does not mean that all of NJT's

funds actually belong to the state. Maj. op. at 23-25. The majority concludes that the funding factor "weighs strongly" against NJT's claim of alter ego status. Maj. op. at 25.

I address the majority's arguments in the reverse order. I agree that NJT's authority to invest in the CMF is of little significance. As the majority points out, the option to invest in the CMF, if relied on, would prove too much considering that other entities that place their funds in the CMF, such as counties, municipalities, and school districts, clearly do not enjoy eleventh amendment immunity. *See* Maj. op. at 23.

With respect to NJT's ability to pay judgments against it, I think the majority's reasoning a bit facile. The majority states that it is "not clear" that NJT would have to turn to the state to make up any shortfalls occasioned by judgments against it. It suggests that NJT could simply raise fares or reduce its expenses or capital budget to make up the deficit. The fiscal realities and operating experiences of urban mass transit systems in the United States, including NJTRO, would seem to negate such an easy answer. At some point, increases in fares or reductions in the quality or availability of service have the tendency of reducing ridership, and the reduction in ridership in turn diminishes revenue.[1] Given the history of NJT's recurring budgetary crises, and the continuing and

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[1] New Jersey's supplemental appropriation in 1986 of five million dollars designed to reduce the amount of a proposed NJT fare increase demonstrates the legilature's belief in the impracticality and undesirablity of raising passenger fares. P.L. 1986 c.48.

escalating annual appropriation by the state of many millions of dollars to NJT's operating budget[2], it is highly unlikely that NJT could make up significant shortfalls by the simple means suggested by the majority.

Nor could NJT satisfy judgments by incurring debt. Under NJT's enabling statute (the New Jersey Public Transportation Act of 1979 or "the Act"), NJT is explicitly prohibited from incurring a deficit. N.J. Stat. Ann. § 27:25-17 (West Supp. 1988). Moreover, the grant anticipation notes (GANs) mentioned by the majority, *see* Maj. op. at 19, do not constitute a revenue raising resource. The Act permitting their use explicitly asserts that GANs are not bonds but rather a transitory tool for dealing specifically with short term cash flows arising out of delays in receiving federal subsidies. In like manner, the credit arrangements after June 30, 1987, referred to by the majority, are also limited to borrowing against section 9 grant proceeds under the federal Urban Mass Transportation Act "for future working capital." *See* N.J. Stat. Ann. § 27:25-5 (West Supp. 1988). In light of these statutory restrictions and the real economic constraints under which NJT operates, it is hard to see where NJT could turn for money other than to the state.

Lastly, the majority relies on the statutory provision specifically disclaiming the state's liability for NJT's debts. Because of this provision, the majority argues, any increase in the state's appropriation to NJT would be

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[2] According to the supplemental information supplied by NJT to this court, annual appropriations to NJT have increased steadily from $88 million in 1980-1981 to $194 million in 1988-1989. *See* NJT's supplemental submission at 5.

discretionary, and the state is therefore "under no obligation" to reimburse NJT for judgments that it pays. Maj. op. at 21. The majority therefore finds this case indistinguishable from *Kovats* in which we held that Rutgers was not the alter ego of the state. 822 F.2d at 1312.

Granted that the state has insulated itself from liability for NJT's debts and that this is a factor to be considered among the three funding-related *Urbano* criteria. In light of the economic realities facing NJT and the statutory language creating that corporation, however, I cannot agree with the majority that this protective device releases New Jersey from its obligation to financially support NJT.

NJT is by far the greatest provider of mass transit in New Jersey. The state created NJT in 1979 to take over the largest bus carrier in New Jersey, Transport of New Jersey, and to assume the state's commuter rail operations from Conrail. It is common knowledge that the economic vitality of this densely populated and strategic northeast corridor state is heavily dependent upon the availability of mass transportation. In creating NJT, New Jersey recognized the catastrophic effects to the economy and its citizens by a collapsed mass transit and therefore committed huge funds when it undertook to structure a state controlled mass transit system.

One need not look only to economic realities and the historical concept of NJT to see the depth of New Jersey's commitment to it. New Jersey by statute asserted that "[a]s a matter public policy, *it is the responsibility of the State* to establish and provide for the operation and

improvement of of a coherent public transportation system in the most efficient and effective manner." N.J. Stat. Ann. § 27:25-2 (West Supp. 1988)(emphasis added). This succinct language *mandates* the state's ongoing obligation to NJT. Implicit is the state's obligation to provide available financial resources for the purpose of providing transportation, so long as the corporation continues to be a public entity.

Furthermore, it is prudent and good common sense in undertaking large, indefinite, and unknown risks for an enterprise to assume corporate status and limit personal liability for creditor's claims. The insulation from liability to third parties, however, does not demonstrate a lack of financial or governmental commitment to the business or its objectives. The state, in the exercise of reasonable business judgment, may have insulated itself from creditors' claims, as do shareholders in most corporations, but it did not thereby renounce its obligation to sustain NJT. Mass transportation is at once essential to the state and in large part available only through the state-created corporation. In light of these circumstances, and the state's consistent record of having deficit-financed the NJT since its inception, I cannot agree that New Jersey is not a real party in interest, without financial obligation to maintain the operational integrity of NJT.[3]

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[3] Although this court has identified funding as the "most significant factor" in the alter ego balancing test, *Urbano*, 415 F.2d at 251, it has never decided what weight this factor should carry especially when it is suffused by other germane factors. That a judgment would be paid out of the state treasury thus

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II. AUTONOMY

The majority assesses whether NJT enjoys autonomy from the state. Reviewing both the powers granted NJT and the constraints placed on it by the Act, the majority concludes that NJT "lies somewhere between Rutgers and

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may not be enough to cloak an entity with eleventh amendment immunity if other factors dictate to the contrary. Funding is therefore not always a controlling condition of alter ego status.

Moreover, this court has suggested that funding is not even a necessary condition of alter ego status. Although in *Kovats* the decision was against alter ego status, the court allowed for the possibility that an entity may be the alter ego of the state even though a judgment would *not* be paid out of the state treasury.

Although no reported case has squarely presented such a situation, our understanding of the extent of eleventh amendment protection has always provided for the possibility that an entity may enjoy alter ego status even if payment of the judgment would not derive from the state treasury. Such a result would not be inconsistent with the Supreme Court's eleventh amendment jurisprudence that disallows federal jurisdiction over suits against states for damage awards but allows jurisdiction for suits seeking prospective injunctive relief. *See* Edelman v. Jordan, 415 U.S. 651-667-68 (1974); *see also* Green v. Mansour, 474 U.S. 64, 73-74 (1985)(eleventh amendment bars even retroactive declaratory relief against state officials if not coupled with prospective relief). As Judge Sloviter explained in *Kovats*: "Those cases address the forms of relief available when it is clear that relief will run against a state; they do not address the preliminary issue of when relief is deemed to run against the state. As to the former issue, whether the primary relief sought is monetary and/or retroactive is conclusive; as to the latter, it is not." 822 F.2d at 1310, n.7. Thus, there is no mandate against according alter ego status to an entity even though a judgment would not be paid from the state treasury.

Port Authority of New York and New Jersey," an agency held to be an arm of the state. *See Port Authority*, 819 F.2d at 418; Maj. op. at 28. The majority decides that the autonomy factor only "slightly" favors according immunity. I, on the other hand, believe that the heavy governmental control is the most compelling reason for according immunity to NJT.

In support of NJT's independent status, the majority notes that the agency is governed by a board of directors, which can cause NJT to enter contracts, bring lawsuits, buy and sell property, buy insurance, structure the corporation's internal management and set and collect fares. In these respects, the Port Authority, held an arm of the state, is not significantly different. The Port Authority is run by a board of commissioners, N.J. Stat. Ann. § 32:1-5 (West 1963), which has the power to appoint officers and hire employees as it sees fit for the performance of its duties. *Id.* at § 32:1-15. The Authority has the power to buy, build, or lease any terminal within its district. *Id.* at § 32:1-7. It may set charges for the use of its terminals or facilities. *Id.* It may own real and personal property, *id.*, and borrow money and secure the debt by bonds or mortgages on its property. *Id.*

The majority notes, however, that the Port Authority in other respects is less autonomous than NJT. I agree. For example, the Port Authority is forbidden by statute from undertaking new projects without legislative authorization. *Port Authority*, however, does not represent the threshold level of state control that must be exercised for an entity to be an alter ego of the state. Without attempting to exactly locate that level, I believe that NJT, like the Port Authority, exceeds it.

NJT's seven member board of directors consists of four public members who are appointed by the state governor and confirmed by the senate, N.J. Stat. Ann. § 27:25-4(b)(West Supp. 1988), and three members who sit on the board by virtue of their positions within the state government. These include the commissioner of transportation, the state treasurer, and another member of the executive branch appointed by the governor. *Id.* Thus, the appointment of the four public members is controlled by the state and the remaining members of the board are high ranking appointments of the executive branch of the state government. The governor is empowered to remove any public board member for cause. *Id.* Although the Act declares that NJT "is independent of any supervision or control" by the department of transportation, *id.* at § 27:25-4(a), it requires the commissioner of transportation to chair the board. *Id.* at § 27:25-4(d). All board meetings are subject to the New Jersey Open Public Meetings Act. *Id.* at § 27:25-4(g). Importantly, *all proposed board action is subject to gubernatorial veto* and the minutes of every board meeting must be delivered to the governor. *Id.* at § 25:4(f). Thus, the state retains vital policy, organic, and operational control over NJT through its power to appoint NJT's board members and through the governor's veto power and consequent control of the entity's pursestrings.

Furthermore, NJT must submit annual operational and financial reports for the preceding fiscal year to the governor and to the transportation and communications committees of both houses of the legislature. *Id.* at § 27:25-20(b). The Act authorizes the state auditor to examine the corporation's accounts, *id.* at § 27:25-20(e),

and makes its records and papers open to public inspection. *Id.* at § 27:25-20(d). Finally, the commissioner of transportation annually receives a report containing the corporation's operational, capital, and financial reports or plans for the previous, current, and insuing fiscal years. *Id.* at § 27:25-20(a).

NJT is required to consult with state authorities in developing its employee compensation schedule. *Id.* at § 27:25-15. On its completion, the schedule must be filed with the state along with a list of all of NJT's full and part time officers and employees. *Id.* The corporation is additionally subject to New Jersey's competitive bidding statutes. *Id.* at § 27:25-11. Significantly, rules and regulations must be adopted and published in accordance with the Administrative Procedure Act. *Id.* at § 27:25-5(e).

The control that the state has over NJT's board and over NJT operations bears no similarity to the state's relationship to its counties, cities, or school districts or their funds. An examination of the enabling statute reveals pervasive state control over NJT. The corporation's very limited autonomy effectively attenuates the significance that the majority gives to the funding factor.

The majority relies heavily on *Kovats*, 822 F.2d 1303 (1987), for its position that NJT is not the alter ego of the state. The majority believes that as in *Kovats* the facts here are just as strong for the proposition that NJT is not the alter ego of the state. Maj. Op. at 21. I disagree.

There may be similarities in legislative satisfaction of the shortfalls in the two entities, Rutgers University and NJT, but the majority wholly ignores vast differences in origin, public purpose, and state control between the two

organizations. The majority disregards these differences, rigidly compartmentalizes the funding factor, and actually regards this as the decisive factor despite its references to other *Urbano* considerations.

Rutgers University had its origin in Queens College as a private educational institution chartered by King George III of Great Britain in 1776, with a requirement that the president be a member of the Dutch Reformed Church. In 1825, after some previous minor amendments in its charter, it changed its name to the Trustees of Rutgers College in New Jersey. In 1920, by board resolution the college formally excised from its charter all religious and sectarian qualifications and the specific requirement that the president be a member of the Reformed Church. Over the years, Rutgers expanded, became in part a land grant school under federal legislation, and by 1956 consisted of twenty-one colleges and divisions at graduate and undergraduate levels. In 1956 the university was reorganized by the state legislature and its charter substantially amended under an act known as "Rutgers, the State University Act of 1956."[4]

In 1956 the state undertook a more active financial role in the university, and the school became an "instrumentality of the state" for the purpose of providing public higher education. N.J. Stat. Ann. § 18A:65-2(West 1968). The University's purpose, like that of so many other educational institutions in New Jersey, essentially is to provide access to higher learning. Although it serves a

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[4] For a more detailed history, see Trustees of Rutgers College v. Richman, 41 N.J. Super. 259, 125 A.2d 10 (1956).

highly important function in the educational life of New Jersey, Rutgers is neither unique nor indispensable. There are other institutions of higher learning in New Jersey and elsewhere, perhaps not as convenient or as inexpensive, which also provide higher education.

On the other hand, NJT was in the first instance conceived and fathered by the state to provide an indispensable service in its economic, commercial, and social life. It offers a vast network of mass railroad and bus transportation throughout the state. Created as the successor to the Commuter Operating Agency of the New Jersey Department of Transportation, NJT received from the state at cost the transit system's operating property, plant, and equipment. *See* reply brief app. at 73. Section 27:25-4(a) of the Act asserts that NJT was created within New Jersey's executive branch as "a body corporate and politic" and proclaims that "the corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions . . . ."

Although the Act of 1956 declares that Rutgers is an "instrumentality of the state for the purpose of operating the state university," N.J. Stat. Ann. § 18A:65-2 (West 1968), it does not assert, as compared with the 1979 Act creating NJT, that the university is exercising *"essential governmental functions."* N.J. Stat. Ann. 27:25-4(a)(West Supp. 1988) (emphasis added). Moreover, and perhaps more significant, the state of New Jersey does not have the operational, fiscal, and appointive controls over Rutgers that it has over NJT. Based upon the differences in historical origin, purposes, and state control, I believe that *Kovats* is not determinative of NJT's alter ego status.

III. STATUS UNDER STATE LAW

Under the heading "status under state law," the majority gathers the following *Urbano* factors: how local law and decisions treat the agency; whether the agency is separately incorporated; whether it may sue or be sued; and whether it is immune from taxation. Examination of the various factors leads the majority to conclude that, although overall the factors tilt "slightly" in favor of alter ego status, Maj. op. at 28, NJT's status under state law does not significantly help in the eleventh amendment analysis because it is "uncertain." Maj. op. at 26. I agree with the majority that the status under state law analysis tilts in favor of NJT's being the arm of the state, but I believe that the tilt is more than slight.

The treatment of NJT by New Jersey courts favors the agency's alter ego status. The majority notes that the New Jersey Supreme Court declared NJT to be a "public entity" in deciding a case concerning uninsured motorist coverage. *See Ross v. Transport of New Jersey*, No. A-13, slip op. at 3(N.J. Sup. Ct. Feb. 1, 1989); Maj. op. at 26. New Jersey courts addressed NJT's status in two earlier cases as well. Applying the alter ego analysis developed in federal courts for eleventh amendment purposes, the superior court in *Travelers Insurance Co. v. Transport of New Jersey*, 204 N.J. Super. 63, 497 A.2d 900 (1985), concluded that NJT was a public entity. A like decision was announced in *Transport of New Jersey v. Matos*, 202 N.J. Super. 571, 495 A.2d 503 (1985), which held NJT subject to the New Jersey Tort Claims Act.[5]

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[5] NJT's alter ego status has also been the subject of a multitude of reported and unreported federal district court

(Continued on following page)

The majority would introduce ambiguity into this inquiry by seeing in the decision of *Fuchilla v. Layman* 109 N.J. 319, 537 A.2d 652 (1988), a "reluctance on the part of New Jersey courts to accord immunity" to hybrid agencies. I find this ambiguity illusory. In *Fuchilla* the court considered the status of a state university. Whereas the majority sees a close analogy between the school and the mass transit operation, I do not. Not only do they differ in kind, but, for example, amendments to the enabling statute of the school at issue in *Fuchilla* explicitly declared it to be the "public policy of the State that the university shall be given a high degree of self-government." *See Fuchilla*, 537 A.2d at 657 (quoting N.J. Stat. Ann. 18A:64G-3.1). It is, in any event, quite unnecessary to

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(Continued from previous page)

decisions. To our knowledge, every district court that has considered the question has held that NJT is the alter ego of New Jersey. *See* Dykman v. New Jersey Transit Rail Operations, Inc. 685 F. Supp. 79 (S.D.N.Y. 1988); Johnson v. New Jersey Transit Rail Operations, Inc., Civ. No. 87-0173, slip op. (D.N.J. Mar. 15, 1988); Cianfrani v. New Jersey Transit Bus Operations, Inc., Civ. No. 87-3707, slip op. (E.D. Pa. Aug. 11, 1987); Worrell v. New Jersey Transit Bus Operations, Inc., Civ. No. 86-2075, slip op. (D.N.J. Jan. 29, 1987); Williamson v. New Jersey Transit Rail Operations, Inc., Civ. No. 86-5353, slip op. (S.D.N.Y. Jan. 9, 1987); Dunn v. New Jersey Transit Rail Operations, Inc., 681 F. Supp. 246 (D.N.J. 1987); Brotherhood of Locomotive Engineers, 608 F.Supp.1216(S.D.N.Y. 1985); Brotinsky v. New Jersey Transit Auth., Civ. No. 85-0314, slip op. (E.D. Pa. Mar. 20, 1985); Hightower v. New Jersey Transit Rail Operations, Inc., Civ. No. 84-1268, slip op. (D.N.J. Aug. 27, 1984); Saddle River Tours Ltd. v. New Jersey Dep't of Transp., Civ. No. 83-1776, slip op. (D.N.J. Oct 31, 1983), aff'd 745 F.2d 48 (3d Cir. 1984); Gibson-Homans Co. v. New Jersey Transit Corp., 560 F. Supp. 110 (D.N.J. 1982).

resort to analogies when the New Jersey decisions treating NJT itself leave no room for speculation.

Admittedly, there are some characteristics relating to NJT's status under state law that suggest the entity's independence from the state. NJT has been granted the power to sue and be sued. *Id.* at § 27:25-5(a). Other statutory provisions enable NJT to enter into contracts, *id.* at § 27:25-5(r) and (v), buy land, *id.* at § 27:25-13, and purchase stock, equipment, and personal property. *Id.* at §§ 27:25-5(u), 25-10, and 25-5(j).

At the same time, there are other factors that place NJT within the realm of the state. Claims against the corporation are governed by the New Jersey Tort Claims Act. *Transport of New Jersey v. Matos*, 202 N.J. Super. at 573, 495 A.2d at 505, and by the New Jersey Contractual Liability Act. N.J. Stat. Ann. § 27:25-19 (West Supp. 1988). NJT is exempted by statute from all state taxation including, but not limited to, sales taxes, real property taxes, corporate franchise taxes, or income taxes. *Id.* at § 27:25-16. NJT additionally is subject to the provisions of the state administrative procedure act, *id.* at § 27:25-5(e), and has been given the power of eminent domain. *Id.* at § 27:25-13(a)-(c).

The majority would diminish the significance of these last factors by pointing to entities that share those characteristics but are not alter egos of the state. *See* Maj. op. at 27 ("We must be wary of taking these arguments too far, however.") We must also be wary, I believe, of taking comparisons on the basis of discrete factors too far. As the court observed in *Kovats*, " '[t]he decisions in other cases, while helpful in terms of analytic models, cannot

govern our decision [here]. . . .' " 822 F.2d at 1312 (quoting *Soni v. Board of Trustees*, 513 F.2d 347, 353 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976)). Each entity " 'exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances.' " *Id.* It is, after all, the balance of the factors that matters.

In sum, NJT has been granted many of the powers and privileges characteristic of a state, and specifically has been placed within the executive branch of the government. Of necessity, as a corporation transacting business in the commercial world, it enjoys many of the powers relative to operating a business. I believe, however, that overall the criteria decidedly favor alter ego status. Importantly, I think, the New Jersey courts applying the eleventh amendment alter ego analysis to NJT for other purposes have concluded that NJT is a public entity. *Cf. Skehan v. Board of Trustees*, 538 F.2d 53, 62 (3d Cir. 1976) (in banc) (holding dispositive a state court decision finding state colleges such as Bloomsburg State College to be agencies of the state for sovereign immunity purposes). On the whole, therefore, the status of NJT under state law favors alter ego status in this case.

Based upon my belief that the essential criteria under *Urbano* and our prior decisions weigh in favor of NJT's alter ego status, I would hold that its wholly owned subsidiary, NJTRO, is entitled to eleventh amendment protection.

IV. ELEVENTH AMENDMENT IMMUNITY

Because of the result I reach with respect to NJTRO's status as an arm of the state, I turn to the question not

discussed by the majority but actually raised by the plaintiff in the trial court: whether the FELA contains the unequivocal statutory language necessary to abrogate the state's eleventh amendment immunity and subject NJTRO to suit in the federal court.

Eleventh amendment immunity may be avoided by congressional abrogation under the power granted by the enforcement provisions of section 5 of the fourteenth amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), or, as we have previously held, under the commerce clause of Article I. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988). Furthermore, a state can waive its eleventh amendment immunity and consent to suit in federal court. *Welch v. State Dep't of Highways and Public Transp.*, 55 U.S.L.W. 5046, 5048 (1987). Fitchik argues that both exceptions apply.

Plaintiff argues that the FELA, considered in conjunction with the wealth of federal safety legislation applicable to state owned railroads, manifests Congress' unmistakable intention to abrogate the state's eleventh amendment immunity. Fitchik additionally contends that New Jersey waived its eleventh amendment immunity when it undertook to operate an interstate railroad while *Parden* was prevailing law. Both contentions require examination into the impact that the Supreme Court's recent decision in *Welch* has upon *Parden*.

In *Welch*, the petitioner, an employee of the Texas Department of Highways and Public Transportation, filed a personal injury suit against the respondent pursuant to the Jones Act. 55 U.S.L.W. at 5047. Significantly, the Jones

Act applied the remedial provisions of the FELA to seamen. Initially, the Court recognized that the eleventh amendment functions as an affirmative limitation on Article III's grant of judicial authority. *Id.* at 5048. The Court, however, then considered the two exceptions that limit states' eleventh amendment protection. Discussing the waiver exception, the Court cautioned that because "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights," a court will find "a waiver by the state only where stated by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.* (quoting *Edelman,* 415 U.S. at 673). Discussing the abrogation exception, the Court explained that Congress may abrogate the eleventh amendment without the states' consent when it expresses "its intention . . . in unmistakable language in the statute itself." *Id.* (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 243 (1985)).

Applying the preceding analysis to the case before it, the Court held that the Jones Act's reference to "*any* seaman who shall suffer personal injury" did not constitute the unmistakable statutory language necessary for congressional abrogation of eleventh amendment immunity.[6] It reasoned that because the doctrine of sovereign immunity implies a constitutional distinction between the states and other employers of seamen, "a general authorization for suit in federal court is not the kind of unequiv-

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[6] The Court observed that the question of whether Texas had waived its immunity was not before it.

ocal statutory language necessary to abrogate the eleventh amendment." *id.* at 5048-49 (quoting *Atascadero*, 473 U.S. at 246).

The Court next considered the effect of its decision upon *Parden*, a case holding that Congress intended to abrogate the states' eleventh amendment immunity merely by making the FELA applicable to every common railroad carrier. *See Parden v. Terminal Railway*, 377 U.S. 184, 190 (1964). The Court concluded that *Parden* was mistakenly decided insofar as it interpreted Congress' failure to *explicitly exclude* state railway workers from the scope of the FELA as a sufficient indication of its desire to subject the states to suit in federal court. Observed the Court: "Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Welch*, 55 U.S.L.W. at 5049. Thus, the Court overruled *Parden* to the extent that it was inconsistent with the requirement that congressional abrogation of eleventh amendment immunity be expressed in unmistakably clear language.

In light of *Welch*, plaintiff's argument that the FELA manifests Congress' intention to abrogate the states' immunity is simply incomprehensible. *Welch*'s rejection of *Parden* unequivocally stands for the proposition that the language of the FELA is insufficient to subject the states to suit in federal court. The Rail Safety and Service Improvement Act, 45 U.S.C. § 431, federal legislation transferring the railroad to state control, and other federal legislation applicable to state owned railroads on

which Fitchik relies similarly fail to manifest the unmistakable congressional intention necessary to abrogate the eleventh amendment.

Plaintiff further contends that New Jersey constructively waived its immunity when it chose to operate a railroad while *Parden* was the law of the land. *Parden* was premised at least in part upon the conclusion that the state had consented to suit in federal court. Fitchik argues that *Welch* does not reject entirely the notion of constructive consent; it merely holds that finding consent in *Parden* was inappropriate because the FELA did not provide a sufficiently clear statement that a state's operation of a railroad would work a waiver of eleventh amendment immunity. Plaintiff distinguishes this case by reasoning that the Supreme Court's decision in *Parden*, rather than the FELA itself, provided the clear statement that New Jersey would waive its immunity by assuming control of an interstate railroad.

Although this argument may have some initial appeal, it cannot withstand scrutiny. By 1982, when New Jersey undertook to operate the railroad, it was already questionable whether *Parden* was good law. Significantly, in *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Supreme Court refused to extend the reasoning of *Parden* to hold states subject to suit in federal court under the Fair Labor Standards Act, even though the FSLA and the FELA did not differ greatly in terms relevant to eleventh amendment immunity. *See Employees*, 411 U.S. at 299 (Brennan, J., dissenting); *see also Edelman*, 415 U.S. at 673-74 (rejecting argument that state waived eleventh amendment immunity by participating in federal program when legislation

creating program lacked clear language that participation would signal constructive consent to suit in federal court). It is therefore arguable whether *Parden* provided a clear statement that New Jersey would waive its eleventh amendment immunity by operating the railroad. Consequently, it is uncertain whether New Jersey consented to federal jurisdiction when NJTRO began operations.

The ambiguity in decisional law at the time New Jersey began operation of the railroad is especially significant in light of the rule that a court will find waiver only where it is stated explicitly or is the only "reasonable construction." *See Welch*, 55 U.S.L.W. at 5048 (quoting *Edelman*, 415 U.S. at 673). Plaintiff has not established that New Jersey has waived its immunity by "express language." *See id.* Moreover, I am unwilling to draw the broad inference that New Jersey accepted the doubtful rule of *Parden* and waived its immunity to suit in federal court as a condition to operating the railroad. It is equally reasonable to assume that New Jersey chose to operate the railroad *despite Parden*, and was willing to challenge the decision in that case should the need arise. I would, therefore, decline to hold that New Jersey constructively consented to suit in federal court, and would hold that the eleventh amendment precludes plaintiff from maintaining a FELA action against NJTRO in federal court.[7]

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[7] I would additionally reject Fitchik's assertions that the district court improperly characterized the issue before it as one of subject matter jurisdiction, and that denying state railroad employees access to federal court on FELA claims violates the equal protection clause.

V. CONCLUSION

Facing the potential disaster that was threatened by a decaying public transportation system, the state of New Jersey in 1979 chose to enter the mass transit business. It did so not by creating yet another governmental subdepartment, but by the practical means of establishing a transportation corporation sheltered from the perennial delays, costs, and frustrations of a governmental structure. At the same time, however, the state retained control over corporate policies and the power to select the members of the board. Moreover, so long as the state maintains its statutory policy to provide mass public transportation and exercises its powers of control over NJT, the state remains implicitly obligated to sustain the financial vitality of the corporation it created. Thus, NJT is the alter ego of the state and New Jersey never stripped it of eleventh amendment immunity. As such, NJTRO is entitled to eleventh amendment immunity in an action against it in federal court.

For the foregoing reasons, the district court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction should be affirmed.

Judges HIGGINBOTHAM, GREENBERG, HUTCHINSON, and NYGAARD join in this dissenting opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5142

JOSEPH P. FITCHIK,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.
Appellee

v.

NON DESTRUCTIVE TESTING CORP.,
Third-Party Defendants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-3060)

JOSEPH A. COFFEY, JR., ESQ.
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Deputy Attorney General
GRACE A. DENNIGAN
Deputy Attorney General
EMERALD L. ERICKSON (Argued)
Deputy Attorney General
Attorneys for Appellee

NO. 88-5270

LINDA A. DEGIROLAMO,
Appellant

v.

NEW JERSEY TRANSIT AUTHORITY
d/b/a NEW JERSEY TRANSIT,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (TRENTON)
(D.C. Civ. No. 86-3901)

NO. 88-5320

FELIX E. GUZMAN,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0799)

NO. 88-5321

SIDNEY KINNEAR,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0802)

NO. 88-5322

KENNETH G. BANTA,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

v.

EVERETTE G. WHITENOUR, CHRISTOPHER
MIDDLETON, JUSTINE SMITH, AND TOWN
OF DOVER,
Third Party Defendants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-3413)

NO. 88-5323

WILLIAM ROCKWELL,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (TRENTON)
(D.C. Civ. No. 84-4214)

NO. 88-5324

ROBERT K. HEATON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-4829)

NO. 88-5325

WILLIAM P. McKENNA,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1534)

NO. 88-5326

ANDY M. SEAMON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-4688)

NO. 88-5327

CRAIG A. CONLON,
Appellant

v.

NEW JERSEY RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-4689)

NO. 88-5328

LAURENCE O'HALLORAN,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-2266)

NO. 88-5329

DENNIS MARTIN,
Appellant

v.

NEW JERSEY TRANSIT CORPORATION &
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-2266)

NO. 88-5336

ROBERT G. STOCKER, SR.,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 84-4244)

NO. 88-5337

CLIFFORD E. WILLIAMSON,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1322)

NO. 88-5338

DAVID J. CHWASZCZEWSKI,
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 87-1535)

NO. 88-5559

ASHRAF GHOBRIAL
Appellant

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY (NEWARK)
(D.C. Civ. No. 86-0584)

Argued July 19, 1988
Before: Higginbotham, Becker, and Rosenn,
Circuit Judges

Opinion Filed: October 24, 1988

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

These consolidated appeals require us to resolve the important question of whether the eleventh amendment precludes the plaintiff-appellants from instituting actions in federal court under the Federal Employers' Liability Act (FELA) action against the defendant-appellee, New Jersey Transit Rail Operations, Inc. (NJTRO). By opinion, the United States District Court for the District of New Jersey granted defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction. Fitchik appeals and we affirm.

I.

On December 30, 1985, the plaintiff, Joseph P. Fitchik, a NJTRO conductor, was seriously injured when his train struck a track guard. Fitchik thereafter filed a complaint against defendant pursuant to the FELA, 45 U.S.C. § 51 *et. seq.*, seeking compensatory damages. Based upon Fed. R. Civ. P. 12(h)(3), and upon the Supreme Court's recent decision in *Welch v. State Department of Highways and Public Transportation*, 55 U.S.L.W. 5046 (1987), the district court dismissed plaintiff's complaint, holding that the FELA failed to manifest the unmistakable statutory language necessary to abrogate the states' immunity from suit in federal court. In conformity with established eleventh amendment jurisprudence, the district court additionally held that New Jersey was the real and substantial party in interest.

II.

A.

Relying principally upon our decisions in *Urbano v. Board of Managers*, 415 F.2d 247 (3d cir. 1969), *cert. denied*, 397 U.S. 948 (1970), and in *Kovats v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987), plaintiff contends that NJTRO is not the *alter ego* of New Jersey.[1] Fitchik correctly observes that our consideration of whether the FELA abrogates eleventh amendment immunity is premised upon a determination that NJTRO is an arm of the

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[1] We consider Fitchik's arguments as representative of those asserted by each of the plaintiffs whose appeals have been consolidated.

state.[2] Our review of defendant's entitlement to eleventh amendment immunity is plenary. *Skehan v. State Sys. of Higher Educ.*, 815 F.2d 244, 246 (3d Cir. 1987).

The eleventh amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite the amendment's language, the Supreme Court has consistently interpreted it to immunize an unconsenting state "from suits brought in federal court by her own citizens as well as by citizens of another state." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees v. Missouri Dep't of Pub. Health and Welfare*, 411 U.S. 279, 280 (1973)).

A suit may be barred by the eleventh amendment even though a state is not named a party to the action. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Court has attempted on several occasions to determine just when a suit against an entity is actually a suit against the state itself. In *Pennhurst*, for example, the Court asserted that the state is the real party in interest when " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if

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[2] Although the alter ego issue was not argued by plaintiff in the district court or in his opening brief to this court, we will nonetheless consider it. We may decide a pure question of law even if not raised below where refusal to reach the question might result in a miscarriage of justice or where the question's resolution is of public importance. Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360-61 (11th Cir. 1984).

the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " 465 U.S. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). This court, however, has formulated a more specific and more comprehensive test to determine whether eleventh amendment immunity extends to an entity:

> [L]ocal law and decisions defining the status and nature of the agency involved in its relations to the sovereign are facts to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation; and whether the sovereign has immunized itself from responsibility for the agency's operations.

Urbano, 415 F.2d at 250-51.

Before applying *Urbano* to the present action, we observe that NJTRO is a wholly owned subsidiary of New Jersey Transit Corporation (NJT). *Brotherhood of Locomotive Engineers v. New Jersey Transit Rail Operations, Inc.*, 608 F. Supp. 1216, 1217 (S.D.N.Y. 1985). Therefore, any eleventh amendment immunity conferred upon NJTRO would be derivative of that possessed by NJT. *See Kovats*, 822 F.2d at 1306. Finally, the issue of NJT's immunity from suit has been the subject of a multitude of reported

and unreported decisions. To our knowledge, every district court that has considered the question has held that NJT is the *alter ego* of New Jersey.[3]

B.

The apparent clarity of the nine factor *Urbano* standard may sometimes be compromised by its actual application to a specific statutory entity. For example, a single statutory power or limitation may implicate more than one factor. We therefore consider the relevant factors in the sequence which best illuminates NJT's complex enabling statute.

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[3] *See* Worrell v. New Jersey Transit Bus Operations, Inc., Civ. No. 86-2075, slip op. (D.N.J. Jan. 29, 1987); Dykman v. New Jersey Transit Rail Operations, Inc., 685 F. Supp. 79 (S.D.N.Y. 1988); Dunn v. New Jersey Transit Rail Operations, Inc., 681 F. Supp. 246 (D.N.J. 1987); Hightower v. New Jersey Transit Rail Operations, Inc., Civ. No. 84-1268, slip op. (D.N.J. Aug. 27, 1984); Saddle River Tours Ltd. v. New Jersey Dep't of Transp., Civ. No. 83-1776, slip op. (D.N.J. Oct. 31, 1983), *aff'd*, 745 F.2d 48 (3d Cir. 1984); Gibson-Homans Co. v. New Jersey Transit Corp., 560 F. Supp. 110 (D.N.J. 1982); Brotherhood of Locomotive Engineers, 608 F. Supp. at 1216; Johnson v. New Jersey Transit Rail Operations Inc., Civ. No. 87-0173, slip op. (D.N.J. Mar. 15, 1988); Cianfrani v. New Jersey Transit Bus Operations Inc., Civ. No. 87-3707, slip op. (E.D. Pa. Aug. 11, 1987); Williamson v. New Jersey Transit Rail Operations Inc., Civ. No. 86-5353, slip op. (S.D.N.Y. Jan. 9, 1987); Brotinsky v. New Jersey Transit Auth., Civ. No. 85-0314, slip op. (E.D. Pa. Mar. 20, 1985).

We are not, of course, bound by these decisions.

1. Incorporation and Function

NJT was created by the New Jersey Public Transportation Act of 1979 ("The Act") as the successor to the Commuter Operating Agency of the New Jersey Department of Transportation. N.J.S.A. § 27:25-1, *et seq.* (West Supp. 1988). NJT's operating property, plant, and equipment were acquired by New Jersey State and subsequently transferred to the corporation at cost. *See* Reply Brief App. at 73. Section 27:25-4(a) of the Act asserts that NJT was created within New Jersey's executive branch as "a body corporate and politic with corporate succession." The section additionally declares that "the corporation is hereby constituted as an instrumentality of the state exercising public and essential government functions. . . ." *Id.*

Based upon N.J.S.A. § 27:25-4(a), it appears that NJT's performance of essential government functions supports its status as New Jersey's *alter ego*. However, in light of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), we believe that the governmental function criterion is no longer a reliable means for deciding whether an entity is entitled to eleventh amendment protection. *Garcia* explicitly rejected the governmental-proprietary distinction as a basis for determining whether states must comply with federal legislation enacted pursuant to the commerce clause. *Id.* at 541-47. We fail to comprehend how a dichotomy that is unhelpful for commerce clause purposes can somehow become illuminating when applied to the eleventh amendment. Although we cannot disturb the New Jersey legislature's declaration of NJT's corporate purpose, we nonetheless conclude that whether an entity performs a traditionally proprietary, or governmental

function is of little significance for the eleventh amendment.[4]

In deciding whether NJT is separately incorporated, we note that the legislature imbued it with somewhat conflicting characteristics; it is at once "a body corporate and politic" *and* an "instrumentality of the state." N.J.S.A. § 27:25-4(a). Therefore, the separate incorporation factor mediates neither in favor, nor thwarts NJT's *alter ego* status.

2. Suits and Immunities

N.J.S.A. § 27:25-5(a) grants NJT the power to sue and be sued; however, claims against the corporation are governed by the New Jersey Tort Claims Act, N.J.S.A. § 59:1-1 *et seq.* (West 1982 & Supp. 1988), and by the New Jersey Contractual Liability Act, N.J.S.A. § 59:13-1 *et seq.* (West 1982) *see also* N.J.S.A. § 27:25-19. Although the power to sue and be sued generally implies an entity's independence from a state, NJT is subjected to the foregoing statutes which apply *exclusively* to claims against *public* entities.

Several statutory provisions accord NJT the ability to enter into contracts. *See* N.J.S.A. §§ 27:25-5(r), 25-5(v) and 25-6. The corporation may buy land, N.J.S.A. § 27:25-13, and may purchase capital stock, equipment and personal

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[4] "Indeed, the 'traditional' nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently 'traditional' function is often yesterday's suspect innovation." *Garcia*, 469 U.S. at 544 n.9.

property. N.J.S.A. §§ 27:25-5(u), 25-10 and 25-5(j).[5] All property owned by the corporation or by any of its wholly owned subsidiaries is deemed state property. N.J.S.A. § 27:25-16. NJT has additionally been given the power of eminent domain. N.J.S.A. § 27:25-13(a)-(c). *See Gibson*, 560 F. Supp. at 113. Finally, N.J.S.A. § 27:25-16 exempts NJT from all state taxation including, but not limited to, sales taxes, real property taxes or assessments, corporate franchise taxes, and income taxes.[6]

In sum, NJT's power to enter into contracts suggests its independence from New Jersey. On the other hand, the entity's exemption from state taxation and its power of eminent domain support its *alter ego* status. Finally, the impact of NJT's ability to sue and be sued is attenuated by its subjection to the Tort Claims and Contractual Liability Acts.

3. Funding and Insulation from Responsibility

Our precedents have uniformly asserted that among the most important factors in the eleventh amendment inquiry is whether a judgment against an entity will have a financial impact upon the state treasury. *See Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). In this respect, the question of whether the

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[5] NJT may additionally sell or lease its real and personal property. N.J.S.A. § 27:25-5(k).

[6] NJT's tax exemption is predicated upon its exercise of powers in all respects "for the benefit of the people of the state." N.J.S.A. § 27:25-16.

state is the real party in interest generally depends upon whether "the action is in essence one for the recovery of money from the state." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945).

Our analysis of the effect of a judgment against NJT is illuminated by our recent opinion in *Kovats*, where we decided that the State University at Rutgers was not entitled to eleventh amendment immunity. 822 F.2d at 1303. Considering the funding issue, we observed that Rutgers had four distinct sources of income: auxiliary income from dining hall and room rental fees; restricted income from governmental and private groups; general university income from tuition, fees, and investments; and state appropriations. *Id.* at 1308. Rutgers' use of the first two revenue sources was restricted to the service or program that engendered the income. The remaining sources, which comprised approximately seventy-two percent of the University's total income, were commingled in a general operating account used to fund daily operations.[7] *Id.*

Importantly, a judgment against Rutgers could be satisfied in its entirety from non-state funds contained in both the commingled account and in several segregated accounts. Segregated accounts consisted entirely of non-state funds. For example, Rutgers' Board of Trustees held title to land and buildings valued at more than $40 million. *Id.* at 1309. Rutgers deposited interest income from these and other assets into segregated accounts available

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[7] State appropriations constituted between 50 and 70% of the general operating account. *Id.* at 1308.

for use by its Board of Governors.[8] *Id.* By virtue of N.J.S.A. § 18A:65-25(d) (West 1968 & Supp. 1988), Rutgers retained sole discretionary control over *both* its commingled and segregated accounts subject only to state audit. Unlike many state agencies, the University maintained its own accounts and was not required to manage its funds as public monies. *Id.* Based upon Rutgers' retention of substantial non-state funds subject to its discretionary use, we concluded that a judgment for the recovery of money against it would have no impact upon the state treasury.

Rutgers, however, argued that even a judgment paid from non-state funds would have an indirect effect on the state treasury because New Jersey would be compelled to make up any resultant shortfalls with increased appropriations. *Id.* The court rejected defendant's contention, asserting that because New Jersey had insulated itself by statute from the University's obligations, any increase in appropriations would be entirely the result of discretionary action by the state. *Id.; see also Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652, 656 (1988) (although legislature might increase the size of an appropriation because of a judgment, the indirect effect of that payment on the state treasury is not sufficient to invoke eleventh amendment immunity). Although the court ultimately held that Rutgers was not immune from suit in federal court, it asserted that a particular entity's entitlement to eleventh

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[8] Between 1983 and 1985, Rutgers used from $44 to $48 million in auxiliary non-state income as a pledge to its bondholders.

amendment protection must be considered on a case-by-case basis:

> The decisions in other cases, while helpful in terms of analytic models, cannot govern our decision as to Rutgers because "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances."

822 F.2d at 1312 (quoting *Soni v. Board of Trustees*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976)).

We do not believe that *Kovats* stands for the rather broad proposition that a state sufficiently disassociates itself from an entity merely by funding it through appropriations rather than by direct payments to its creditors. Instead, we are required to discern whether the payment of any judgment against the entity must be made out of funds subject to the control of the state. Any impact upon funds subject to state control affects the state as a "real, substantial party in interest," *Ford*, 323 U.S. at 464, entitling it to invoke its sovereign immunity from suit. To the extent that an entity's income derives predominantly from property and monies subject to state control, a judgment against it can be said to impact on the state treasury. With these principles in mind, we turn to the facts of the present dispute.

NJT may collect fares from its operations, N.J.S.A. § 27:25-5(n), and may collect fees and rental charges from its properties. N.J.S.A. § 27:25-5(o). The Act additionally empowers the corporation to seek money from any federal, state, county, or municipal agency, or from any private source. N.J.S.A. § 27:25-5(g). Moreover, the legislature recently amended the Act to permit NJT to issue

"Grant Anticipation Notes" (GANs), or short term credit obligations issued in advance of federal operating subsidies. N.J.S.A. § 27:25-5(w). The GANs, however, do not constitute a debt or liability of either the corporation or of New Jersey and specifically are payable only from the federal grants to the corporation and from the note proceeds and investment earnings thereon. *Id.* Indeed, the Act explicitly prohibits NJT from incurring a deficit of any kind. N.J.S.A. § 27:25-17. Although New Jersey has explicitly disclaimed liability for obligations incurred by NJT, *id.*,[9] the state will appropriate over $193 million to the corporation for the 1988-89 fiscal year.[10] Supp. Inf. App. at 5. During the 1987 fiscal year, state appropriations and state fare assistance programs comprised approximately thirty-three percent of NJT's total revenues and operating subsidies, while passenger fares constituted fifty-three percent.[11] Reply Brief App. at 69. NJT

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[9] N.J.S.A. § 27:25-17 asserts, in relevant part, that:

> All expenses incurred by the corporation in carrying out the provisions of this act shall be payable from funds available to the corporation therefore and no liability or obligation shall be incurred by the corporation beyond the extent to which moneys are available.

[10] In addition, New Jersey will appropriate over $130 million to NJT in capital grants during 1988 and 1989. Supp. Inf. App. at 5. From 1980 to the present, New Jersey appropriated approximately $518 million to the corporation in capital subsidies. *Id.*

[11] Plaintiff suggests that any effect a judgment might have on the state treasury is somehow minimized because New Jersey contributes only 33% of NJT's total revenues and operating subsidies. Given our assertion that the nature of a state's

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derived the balance of its 1987 income from federal grants and other operating revenues.

NJT may deposit its revenues in interest bearing accounts or in the State of New Jersey Cash Management Fund (CMF). N.J.S.A. § 27:25-5(p). The CMF, a common trust fund established and maintained by the Director of the Division of Investment and by the State Treasurer, is a legal depository for public monies. N.J.S.A. § 52:18A-90.4 (West 1986). The CMF may additionally contain money that insure to the benefit of the General State Fund. N.J.S.A. § 52:18A-90.1. NJT additionally maintains a non-interest bearing General Operating Account (GOA) which provides funds for payroll and other daily expenditures. NJT's 1987 audited financial report, supplied by plaintiff in his reply brief, discloses that injury and damage claims are satisfied from a restricted fund unavailable for daily operations. From our examination of the financial report, we presume that the GOA is the source of monies deposited in the restricted fund.[12] Reply Brief App. at 69-75.

We note that all of NJT's revenues, including its passenger fares, are by definition public monies because they may be deposited in the CMF. *See* N.J.S.A. § 27:25(p).

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obligation to contribute may be more important than the size of its contribution, we reject plaintiff's attempt to impose a mechanical formula for determining eleventh amendment immunity. *See Skehan*, 815 F.2d at 248.

[12] The corporation is self-insured and may carry its own liability insurance. *See* N.J.S.A. § 27:25-5(r); Reply Brief App. at 73.

We again observe that New Jersey owns *all* of NJT's property. It follows that any revenues generated by the corporation's capital are public in nature. Thus, even if some of the corporation's revenue were non-public in origin, it would nonetheless constitute public monies. Moreover, NJT does not segregate its state funds from its non-state funds. Presumably, the restricted fund, out of which NJT satisfies judgments against it, consists of a combination of state appropriations, which the state is mandated to make by virtue of its statutory commitment to provide public transportation, and operating revenues. These two income sources constitute approximately eighty-eight percent of NJT's total income, and the balance comprises principally federal grants and some non-operative revenues. Therefore, unlike Rutgers, NJT simply has *no* segregated non-state funds available for its use that are not subject to state control.

Additionally, NJT does not have discretionary control over investment of its revenues and subsidies. Income invested in the CMF[13] is subject to the same restrictions

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[13] The State Treasurer may additionally promulgate, pursuant to the Administrative Procedure Act, N.J.S.A. § 52:14B-1 *et. seq.* (West 1986 & Supp. 1988), those rules and regulations deemed necessary for the efficient administration of the CMF, including but not limited to:

> (1) the specification of minimum amounts which may be deposited in the fund and minimum periods of time for which deposits shall be retained in the fund: (2) creation of a reserve for losses; (3) provision for payment of administration expenses from its earnings; and (4) distribution of

(Continued on following page)

provided for investment in the state treasury.[14] *See* N.J.S.A. § 52:18A-90.4. Thus, while Rutgers was empowered to maintain its own accounts and exercise discretionary control over both its commingled and segregated funds, NJT is compelled to manage its funds as public monies. *See Kovats*, 822 F.2d at 1309. Based upon the foregoing, we conclude that NJT is unable to pay a judgment against it from non-state funds subject to its discretionary use. Therefore, recovery of a judgment against NJT would have an impact upon the New Jersey treasury. *See Gibson-Homans*, 560 F. Supp. at 113.

Relying on *Kovats*, Fitchik vigorously argues that because New Jersey has insulated itself from NJT's liabilities, any effect that a judgment might have upon the state treasury would be indirect. *See Kovats*, 822 F.2d at 1309. Plaintiff, however, ignores the differences between the respective enabling statutes. We noted in *Kovats* that

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> the earnings in excess of such expenses or allocation of losses to the several participants in a manner which equitably reflects the differing amounts of their respective investments and the differing periods of time for which such amounts were in the custody of the fund.

[14] An affidavit submitted by NJT Assistant Treasurer John Burns in response to an inquiry by the court to counsel for both parties avers that funds deposited in the interest bearing accounts are *also* subject to state imposed investment restrictions. Although plaintiff objected generally to Burns' assertions, he offered nothing whatsoever to the contrary. Because we conclude that New Jersey's control over investment in the CMF *alone* is sufficient to deprive NJT of discretionary use of its funds, we need not determine the extent of state imposed investment restrictions on the interest bearing accounts.

the legislature's decision to increase Rutgers' appropriation was discretionary. *Id.* On the other hand, N.J.S.A. § 27:25-2 asserts that "it is the *responsibility of the State* to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner" (emphasis added). We believe that this language *mandates* the state's continuing financial obligation to NJT so long as the corporation remains a public entity.[15] *See also Port Auth. Police Benevolent Ass'n v. Port Auth.*, 819 F.2d 413, 416 (3d Cir), *cert. denied*, 108 S. Ct. 344 (1987) (agency entitled to eleventh amendment immunity at least in part because governing statute provided that "unless . . . revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amounts needed]"). As evidence of its continuing obligations, New Jersey increased NJT's appropriations from approximately $80 million in 1980-81 to $193 million for the current fiscal year. We therefore concur with the *Gibson-Homan* court's assertion that: "The fiscal realities of operating a public transportation system, coupled with the inability of the corporation to incur debt or to raise money through sale of its own bonds, dictates the continuation of appropriations of state funds to New Jersey Transit."[16] 560 F. Supp. at 113-14.

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[15] The non-discretionary nature of New Jersey's obligation to maintain an efficient and affordable transportation system is further demonstrated by a 1986 supplemental appropriation in the amount of $5 million designed to reduce the amount of a proposed NJT fare increase. P.L. 1986, c.48.

[16] Similarly, the court in *Brotherhood of Locomotive Engineers* noted: "[T]hese facts necessarily require that state funds flow freely into the coffers of New Jersey Transit as needed to prevent a deficit." 608 F. Supp. at 1218.

Fitchik finally argues that NJT's ability to issue GANs constitutes a revenue raising device sufficient to satisfy a judgment against it. We disagree. The Act explicitly asserts that GANs are not bonds, but rather a specified means of dealing with short term cash flow problems arising out of delays in receiving federal subsidies. *See* N.J.S.A. § 27:25-5 (Introductory Statement). For the foregoing reasons, we conclude that the funding factor supports NJT's *alter ego* status.

4. Autonomy

Because the eleventh amendment is designed to assure that federal courts do not interfere with a state's public policies, the degree of an entity's autonomy is a significant factor in the immunity inquiry. *Blake*, 612 F.2d at 725.

NJT's administrative authority is vested in a seven member board consisting, in part, of the Commissioner of Transportation, the State Treasurer, and another member of the executive branch selected by the Governor.[17] N.J.S.A. § 27:25-4(b). The remaining members are drawn from the public and are appointed by the Governor with the advice and consent of the Senate. *Id.* Although the Act declares that NJT "is independent of any supervision or control" by the Department of Transportation, it requires the Commissioner of the Department to serve as chairman of the Board of NJT and the Act empowers the Governor to remove any public member of the Board for

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[17] These member sit *ex officio*, N.J.S.A. § 27:25-4(b).

cause and to veto any board action. N.J.S.A. § 27:25-4(b) and (f). Both the Governor and the Commissioner of Transportation receive a report containing the corporation's operational, capital, and financial plans for the current and ensuing fiscal year. N.J.S.A. §§ 27:25-4(d); 25-20(a) and (b). The Governor additionally receives a copy of the minutes of every board meeting, N.J.S.A. § 27:25-4(f). Finally, all board meetings are subject to the New Jersey Open Public Meetings Act, N.J.S.A. § 27:25-4(g).

Labor relations between NJT and its employees are governed by the New Jersey Employer-Employee Relations Act, N.J.S.A. § 34:13A-1 *et. seq.* (West 1988), and are within the jurisdiction of the Public Employment Relations Commission. N.J.S.A. § 27:25-14(c). In developing its employee compensation schedule, NJT is required to consult with state authorities. N.J.S.A. § 27:25-15. Upon its completion, the schedule must be filed with the state along with a list of all of NJT's full and part time officers and employees. *Id.* The corporation is additionally subject to New Jersey's competitive bidding statutes. *See* N.J.S.A. § 27:25-11. The State Auditor may examine the corporation's accounts, N.J.S.A. § 27:25-20(e), and the general public may inspect its records and papers. N.J.S.A. § 27:25-20(c). Finally rules and regulations adopted by NJT are published in accordance with the Administrative Procedure Act, and are filed with the Director of the Office of Administrative Law. N.J.S.A. § 27:25-5(e).

The preceding statutory presentation compels the conclusion that NJT has only limited autonomy from New Jersey. Three members of NJT's board are members

of the state's executive branch and the remaining members may be removed by the Governor for cause. The State's pervasive authority over NJT's operations is further demonstrated by the Governor's veto power over *any* board action. Even though the Act asserts that NJT is independent of the Department of Transportation, the Commissioner of that Department is given the power to review the corporation's expenditures and budget. Moreover, NJT is subject to several statutes governing public entities, including the Administrative Procedure Act and the Employer-Employee Relations Act. Once again, we believe that *Kovats* is distinguishable from the case before us. Rutgers' enabling statute explicitly accorded the University Trustees "a high degree of self-government." 822 F.2d at 1311. Among other things, the University was not required to manage its funds as public monies, nor comply with New Jersey's civil service, competitive bidding, or state administrative procedure statutes. *Id.* at 1311-12. We conclude that the autonomy factor decisively favors NJT's *alter ego* status.

5. Status and Nature of NJT under New Jersey Law

Although the eleventh amendment inquiry remains one of federal, and not state, law, local law decisions concerning an entity's relationship to a state may be an important, and under some circumstances, a controlling factor in the determination of immunity. *Blake*, 612 F.2d at 722. New Jersey courts have had at least two opportunities to consider NJT's status under state law. In both *Transport of New Jersey v. Matos*, 202 N.J. Super. 571, 495 A.2d 503 (1985); and *Travelers Insurance Co. v. Transport of New Jersey*, 204 N.J. Super. 63, 497 A.2d 900 (1985), the

Superior Court of New Jersey held, relying upon the relevant provisions of NJT's enabling statute, that the corporation was a public entity.[18] Thus, local law decisions weigh in favor of NJT's *alter ego* status.

6. Conclusion

Based upon our determination that a majority of the *Urbano* factors militate in favor of NJT's *alter ego* status, we hold that the corporation's wholly owned subsidiary, NJTRO, is entitled to eleventh amendment protection.

III.

We now consider whether any exception applies to remove NJTRO's immunity from suit in federal court. Eleventh amendment immunity may be avoided by congressional abrogation under the power granted by the enforcement provisions of section 5 of the fourteenth amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), or, as we have previously held, under the commerce clause of Article I. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987). Furthermore, a state can waive its eleventh amendment immunity and

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[18] In *Matos*, the court determined that NJT was subject to the New Jersey Tort Claims Act and therefore not required to maintain uninsured motorist protection coverage. 495 A.2d at 505. In determining that NJT was a public entity, the court stressed the corporation's lack of autonomy from the state. Although the *Travelers* court similarly held that NJT was an arm of New Jersey, it nonetheless concluded that the corporation *was* required to provide uninsured motorist protection. 497 A.2d at 904.

consent to suit in federal court. *Welch*, 55 U.S.L.W. at 5048. Fitchik argues that both exceptions apply.

Plaintiff argues that the FELA, considered in conjunction with the wealth of federal safety legislation applicable to state owned railroads, manifests Congress' unmistakable intention to abrogate the state's eleventh amendment immunity. Fitchik additionally contends that New Jersey constructively waived its eleventh amendment immunity when it undertook to operate an interstate railroad while *Parden* was prevailing law. Both contentions require examination into the impact that the Supreme Court's recent decision in *Welch* has upon *Parden*.

In *Welch*, the petitioner, an employee of the Texas Department of Highways and Public Transportation, filed a personal injury suit against the respondent pursuant to the Jones Act. 55 U.S.L.W. at 5047. Significantly, the Jones Act applied the remedial provisions of the FELA to seamen. Initially, the Court recognized that the eleventh amendment functions as an affirmative limitation on Article III's grant of judicial authority. *Id.* at 5048. The Court, however, then considered the two exceptions that limit states' eleventh amendment protection. Discussing the waiver exception, the Court cautioned that because "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights," a court will find "a waiver by the state only where stated by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.* (quoting *Edelman*, 415 U.S. at 673). Discussing the abrogation exception, the Court explained that Congress may abrogate the eleventh amendment without the states' consent

when it expresses "its intention . . . in unmistakable language in the statute itself." *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

Applying the preceding analysis to the case before it, the Court held that the Jones Act's reference to *"any* seaman who shall suffer personal injury" did not constitute the unmistakable statutory language necessary for congressional abrogation of eleventh amendment immunity.[19] It reasoned that because the doctrine of sovereign immunity implies a constitutional distinction between the states and other employers of seamen, "a general authorization for suit in federal court is not the kind of unequivocal statutory language necessary to abrogate the eleventh amendment." *Id.* at 5048-49 (quoting *Atascadero*, 473 U.S. at 246).

The Court next considered the effect of its decision upon *Parden*, a case holding that Congress intended to abrogate the states' eleventh amendment immunity merely by making the FELA applicable to every common railroad carrier. *See* 377 U.S. at 190. The Court concluded that *Parden* was mistakenly decided insofar as it interpreted Congress' failure to *explicitly exclude* state railway workers from the scope of the FELA as a sufficient indication of its desire to subject the states to suit in federal court. Observed the Court: "Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law."

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[19] The Court observed that the question of whether Texas had waived it immunity was not before it.

Welch, 55 U.S.L.W. at 5049. Thus, the Court overruled *Parden* to the extent that it was inconsistent with the requirement that congressional abrogation of eleventh amendment immunity be expressed in unmistakably clear language.

In light of *Welch*, plaintiff's argument that the FELA manifests Congress' intention to abrogate the states' immunity is simply incomprehensible. *Welch's* rejection of *Parden* unequivocally stands for the proposition that the language of the FELA is insufficient to subject the states to suit in federal court. Fitchik's reliance upon the Rail Safety and Service Improvement Act, 45 U.S.C. § 431, upon federal legislation transferring the railroad to state control, and upon other federal legislation applicable to state owned railroads similarly fails to manifest the unmistakable congressional intention necessary to abrogate the eleventh amendment.

Plaintiff further contends that New Jersey constructively waived its immunity when it chose to operate a railroad while *Parden* was the law of the land. *Parden* was premised at least in part upon the conclusion that the state had consented to suit in federal court. Fitchik argues that *Welch* does not reject entirely the notion of constructive consent; it merely holds that finding consent in *Parden* was inappropriate because the FELA did not provide a sufficiently clear statement that a state's operation of a railroad would work a waiver of eleventh amendment immunity. Plaintiff distinguishes this case by reasoning that the Supreme Court's decision in *Parden*, rather than the FELA itself, provided the clear statement that New Jersey would waive it immunity by assuming control of an interstate railroad.

Although this argument may have some initial appeal, it cannot withstand scrutiny. By 1982, when New Jersey undertook to operate the railroad, it was already questionable whether *Parden* was good law. Significantly, in *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Supreme Court refused to extend the reasoning of *Parden* to hold states subject to suit in federal court under the Fair Labor Standards Act, even though the FSLA and the FELA did not differ greatly in terms relevant to eleventh amendment immunity. *See Employees*, 411 U.S. at 299 (Brennan, J., dissenting); *see also Edelman*, 415 U.S. at 673-74 (rejecting argument that state waived eleventh amendment immunity by participating in federal program when legislation creating program lacked clear language that participation would signal constructive consent to suit in federal court). It is therefore arguable whether *Parden* provided a clear statement that New Jersey would waive its eleventh amendment immunity by operating the railroad. Consequently, it is uncertain whether New Jersey consented to federal jurisdiction when NJTRO began operations.

The ambiguity in decisional law at the time New Jersey began operation of the railroad is especially significant in light of the rule that a court will find waiver only where it is stated explicitly or is the only "reasonable construction." *See Welch*, 55 U.S.L.W. at 5048 (quoting *Edelman*, 415 U.S. at 673). Plaintiff has not established that New Jersey has waived its immunity by "express language." *See id.* Moreover, we are unwilling to draw the broad inference that New Jersey accepted the doubtful rule of *Parden* and waived its immunity to suit in federal court as a condition to operating the railroad. It is equally

reasonable to assume that New Jersey chose to operate the railroad *despite Parden*, and was willing to challenge the decision in that case should the need arise. We therefore decline to hold that New Jersey constructively consented to suit in federal court. Thus, we hold that the eleventh amendment precludes plaintiff from maintaining a FELA action against NJTRO in federal court.[20]

IV.

For the foregoing reasons, the district court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction will be affirmed. Each side to bear its own costs.

BECKER, *Circuit Judge*, dissenting.

A state agency is entitled to immunity from suit in a federal court under the eleventh amendment when a judgment against it "would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). As the majority explains, this court has identified nine interrelated factors that determine whether an entity is an "alter ego" of the state and thus entitled to immunity. *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). As the majority

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[20] We additionally reject Fitchik's assertions that the district court improperly characterized the issue before it as one of subject matter jurisdiction, and that denying state railroad employees access to federal court on FELA claims violates the equal protection clause.

also explains, several of the *Urbano* factors are interrelated.[1] For clarity's sake, I divide the *Urbano* factors into three larger questions as follows:

(1) Whether the money that would pay the judgment would come from the state (this includes three of the Urbano factors – whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);

(2) The status of the agency under state law (this includes four factors – how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and

(3) What degree of autonomy the agency has.

As will be seen *infra*, these factors are not weighed evenly in striking the balance. As will also be seen, an evaluation of the relevant factors leads me to the conclusion that a judgment against New Jersey Transit Rail Operations ("NJTRO") is not a judgment against New Jersey, and therefore the NJTRO is not shielded by New Jersey's sovereign immunity. I therefore respectfully dissent.

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[1] I agree with the majority that one of the factors – whether the agency exercises a government or proprietary function – is no longer a valid criterion given the Supreme Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See Majority Opinion, Typescript at 14. Thus I will not address that factor.

I. FUNDING

Although no single *Urbano* factor is dispositive, the most important is whether any judgment would be paid from the state treasury. *Urbano* itself calls this "the most significant factor," 415 F.2d at 251, and this conclusion is supported by the Supreme Court's jurisprudence which identifies the amendment's central goal as the prevention of federal court judgments that must be paid out of the state's treasury. *See, e.g., Lake Country Estates*, 440 U.S. at 400-01. For example, federal litigants cannot get damages from the state treasury by suing a state officer in his or her official capacity, *see Edelman v. Jordan*, 415 U.S. 651 (1974), although suits against officers for injunctive relief, which affect the state's discretion to pursue its own policies, are permitted. *See Ex Parte Young*, 209 U.S. 123 (1908).

The majority points to the following facts to support its conclusion that New Jersey Transit's ("NJT's") money is in fact the state's money and thus that any judgment against NJT constitutes a judgment against the state: (1) New Jersey gives a significant amount of money to NJT; (2) NJT is entitled to invest its money in the state Cash Management Fund ("CMF"); (3) New Jersey controls the money invested in the CMF; and (4) NJT does not segregate its state and non-state funds.[2] The linchpin of the majority's legal analysis lies in the proposition that "[t]o the extent that an entity's income derives predominantly from property and monies subject to state control, a judg-

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[2] As the majority notes, NJTRO is a wholly owned subsidiary of New Jersey Transit; any immunity NJTRO has is thus derivative of NJT's immunity.

ment against it can be said to impact on the state treasury." *See* Majority Opinion. Typescript at 19.

To place the matter in proper perspective, I note at the outset that NJT's money does *not* come predominantly from the state. As the majority notes, only 33% of NJT's funds come from New Jersey. *See* New Jersey Transit 1987 Annual Report, at 30 (hereinafter "Annual Report"). But even putting that significant factor aside, I note that the fact that an entity derives some of its income from the state does not mean that it is entitled to partake of the state's immunity. "[T]he nature of the state's obligation to contribute may be more important than the size of the contribution." *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). What is significant is whether the money that pays the fine will come from the state treasury rather than the agency's funds, or (alternatively) whether the state must reimburse the agency and thus effectively pay the debt. *See Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1309 (3d Cir. 1987) (holding that a judgment against Rutgers is not a judgment against the state, in large part because the state is not obligated to reimburse Rutgers).

New Jersey, however, is under no obligation to pay NJT's debts, nor to reimburse NJT for judgments that it pays. Indeed, New Jersey has specifically disclaimed any liability for NJT's debts. *See* N.J. Stat. Ann. § 27:25-17. Thus, "[a]ny increase in [NJT's] state appropriation as a result of a judgment against [NJT] will be entirely the result of discretionary action by the state." *Kovats*, 822 F.2d at 1309. Although New Jersey might appropriate funds to NJT to meet any shortfall caused by judgments against NJT, such voluntary payments by a state do not

trigger sovereign immunity.[3] *See id.*; *Blake*, 612 F.2d at 726 (holding that "an ancillary effect on the state treasury will not create an eleventh amendment jurisdictional bar").

Furthermore, it is not clear that NJT would need to request funds from the state coffers in order to meet shortfalls caused by adverse judgments. NJT gets most of its money from fares. *See* Annual Report at 30. Just like a private railroad, NJT can raise revenues by raising fares, thus spreading the costs of accidents among its users. *See* N.J. Stat. Ann. § 27:25-5(n). Alternatively, NJT could cover any shortfall by reducing its expenses or capital budget.

Finally, judgments against NJT will not necessarily lead to shortfalls. NJT is authorized to purchase liability insurance. N.J. Stat. Ann. § 27:25-5(r). It is self-insured for up to three million dollars per occurrence for rail operations, subject to additional participation for larger losses. *See* Annual Report at 34. Thus NJT can meet at least some of the claims against it with the money it has set aside to

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[3] The majority suggests that the state's funding obligation here is greater than its obligation was to Rutgers because a New Jersey statute declares "it is the responsibility of the State to establish and provide for . . . a coherent public transportation system." N.J. Stat. Ann. § 27:25-2(b). I think it clear, however, that this language is merely precatory and does not constitute an obligation by the state to support NJT. Indeed, it is hard to see how this language could possibly be enforced against the state. And even if it could, it does not obligate the state to support NJT. The language equally would allow New Jersey to abandon NJT, as long as it replaced it with another "coherent public transportation system."

cover such liabilities, and therefore need not ask the state or anyone else for help.

The other facts to which the majority points are similarly unpersuasive. As the majority notes, NJT is entitled to invest its funds in the CMF, and funds contained in the CMF are, by definition, "public moneys" N.J. Stat. Ann. § 52:18A-90.4. But the fact that a statute terms property "public" does not mean that it constitutes the state's property for purposes of the eleventh amendment. "Counties, municipalities and school districts" are allowed to deposit moneys in the CMF, N.J. Stat. Ann. § 52:18A-90.4, but it is crystal clear that these entities are not entitled to immunity from suit in federal court. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280-81 (1977).[4] The designation of the money as "public" simply does not answer the question of who has dominion over the money in NJT's accounts.

The only evidence of state dominion over NJT's money to which the majority points is the state's control of monies invested in the CMF. I find this inadequate for

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[4] Indeed, since 1890 the Supreme Court has held that counties and similar political subdivisions of the state are not entitled to eleventh amendment immunity, despite the fact that they exercise state power and receive significant amounts of money from the state. *See Lincoln County v. Luning*, 133 U.S. 529 (1890); *see also Workman v. New York*, 179 U.S. 552, 563-66 (1900) (holding that cities are not entitled to eleventh amendment immunity); *Mt. Healthy*, 429 U.S. at 280-81 (holding that school districts are not entitled to eleventh amendment immunity). Thus, from the time that is was construed as a grant of sovereign immunity, the eleventh amendment has only applied to bar suits which are actually or effectively against the state itself. As this opinion argues, this is not the case here.

three reasons. First, NJT is not obliged to invest in the CMF. The state only gets control of the investments with NJT's consent, so in the first instance control remains with NJT. *See* N.J. Stat. Ann. § 27:25-5(p). Second, control is only significant to the funding factor if it somehow indicates ownership.[5] Since New Jersey does not have a financial interest that would be directly and deleteriously affected by the fund's diminution, the funds in the CMF do not belong to New Jersey, notwithstanding the fact that New Jersey makes investment decisions about the money in the CMF. Third, the control that New Jersey exercises over NJT's money is identical to the control it has over the county, city, and school district funds in the CMF. Yet, as noted above, it is clear that those entities are subject to suit in federal court.

Finally, the fact that NJT does not segregate its accounts is not a reason to accord it sovereign immunity.

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[5] As the majority notes, in *Kovats* this Court did describe the earlier case of *Blake*, 612 F.2d 718, as making the issue of immunity depend in part on the state's "control" over a fund from which a judgment might be paid. 822 F.2d at 1308-09. Significantly, however, what the *Kovats* court referred to as the "control" issue in *Blake* was the question of whether money set aside in a separate account in the state treasury was actually the state's money – either because the state had an obligation to replace it, because there were insufficient funds in the account and the state would be obligated to pay any judgment directly, or because the state generally treated the funds as its own. 612 F.2d 723-24. Thus the issue in *Blake* was not whether the state had influence over the investment of some of the agency's money, but whether that money in fact belonged to the state.

The commingling of the funds does not affect New Jersey's obligation (or rather non-obligation) to replace the money that NJT spends. Nor does it indicate any greater control by New Jersey of the money in the accounts. Furthermore, the bulk of the funds in the account were provided by non-state sources; payments from the fund up to the amount received from other sources (plus interest) can be considered as coming from monies that NJT obtained from the other sources, and thus do not fall under the rubric of state-provided funds. And, in any case, in light of the discussion above, *see supra* pp. 4-5, even if some of the money that pays the judgments came from state appropriations, that does not entitle NJT to sovereign immunity.

Therefore, with respect to the funding issue, unlike the majority, I find this case to be indistinguishable from *Kovats*. Both Rutgers and NJT were created by statute to serve a public purpose, and both receive significant funding from the state. But in neither case has New Jersey obligated itself to pay the entity's debts. Thus judgments against both Rutgers and NJT would be paid out of their own funds, rather than the pubic fisc. Furthermore, both Rutgers and NJT can turn to sources besides state appropriations to meet shortfalls, and NJT also has insurance to help offset its losses. Finally, neither the fact that NJT may invest its funds in the CMF, nor the fact that it does not segregate the funds it gets form state appropriations, provides a meaningful distinction between NJT and Rutgers. Just as it did in *Kovats*, the funding factor here weighs strongly against NJT's claim that it is entitled to immunity from suit in federal court.

II. STATUS UNDER STATE LAW

The second basic *Urbano* question is whether state law treats an agency as independent, or as a part of the state. NJT's capacity to sue and its immunities from state taxation are best considered as part of this inquiry because they help provide a complete picture of New Jersey's treatment of NJT. New Jersey law on the area is checkered; some factors counsel toward according NJT sovereign immunity, while others counsel against. Because NJT's status under New Jersey law is uncertain, the analysis of this factor does not significantly help in determining whether NJT is entitled to immunity from suit in federal court. *Cf. Kovats*, 822 F.2d at 1310 (finding Rutgers' status under New Jersey law to be too indeterminate to aid in the sovereign immunity inquiry).

There is some indication that New Jersey law considers NJT to be an arm of the state. New Jersey law declares that NJT was created to serve a "public purpose." N.J. Stat. Ann. § 27:25-1. More importantly, NJT is subject to the New Jersey Tort Claims Act, *Transport of New Jersey v. Matos*, 202 N.J. Super. 571, 573, 495 A.2d 503, 505 (1985); is immune from state property tax,[6] N.J. Stat. Ann. § 27:25-16; has the power of eminent domain,[7] *id.* at § 27:25-13(a) and (c); and is subject to the strictures of the state administrative procedure act, *id.* at § 27:25-5(e).

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[6] Rutgers was similarly subject to the New Jersey Tort Claims Act, and immune from state property tax. *See Kovats*, 822 F.2d at 1311.

[7] That an entity exercises "a slice of state power" does not itself mean, however, that it is entitled to eleventh amendment immunity. *See Lake Country Estates*, 440 U.S. at 401.

Further, as the majority notes, the Superior Court of New Jersey has twice declared NJT to be a "public" entity, albeit never in the context of sovereign immunity. *See* Majority Opinion, Typescript at 27-28.

On the other hand, New Jersey has given power to NJT in two spheres that *Urbano* identified as indicative that an agency is not entitled to sovereign immunity. New Jersey has accorded NJT a separate corporate existence, N.J. Stat. Ann. § 27:25-4(a), and has given NJT the ability to sue and be sued in its own right. *Id.* at § 27:25-5(a). Furthermore, New Jersey law allows NJT to enter into contracts on its own behalf, *id.* at §§ 27:25-5(r) and (v), and purchase land, stock, equipment, and personal property. *Id.* at §§ 27:25-13, 25-5(u), 25-10, and 25-5(j). Moreover, the New Jersey Supreme Court has held that the University of Medicine and Dentistry of New Jersey, a state university created by statutes similar to the ones that created NJT, is not entitled to eleventh amendment immunity. *See Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988). This evinces some reluctance on the part of the New Jersey courts to accord immunity to agencies whose status under New Jersey statutes is ambiguous.

If characterization by state law were the only factor to be analyzed in the sovereign immunity inquiry, the proper conclusion would be difficult to draw. On balance, however, the "status under state law" factors seem to tilt slightly in favor of the majority's conclusion that NJTRO is entitled to sovereign immunity.

III. AUTONOMY

Turning to the final *Urbano* consideration, the degree of NJT's autonomy from the state, I conclude that, in

terms of autonomy, NJT lies somewhere between Rutgers and the Port Authority of New York and New Jersey – an agency which this Court declared to be entitled to eleventh amendment immunity *See Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.) *cert. denied*, 108 S.Ct. 344 (1987).

In favor of its autonomy, NJT is governed by its own board of directors and is "independent of any supervision or control by the department [of transportation] or any body or officer thereof." N.J. Stat. Ann. § 27:25-4(a) and (b). Moreover, the board has significant powers. Among other things, it can cause the corporation to enter contracts, bring lawsuits, purchase and sell property, buy insurance, structure the corporation's internal management, and set and collect fares. *See* N.J. Stat. Ann. 27:25-5. Furthermore, only the board can initiate action by NJT. The Governor and other members of New Jersey's executive branch have no such authority.

On the other hand, as the majority points out, three out of seven of the board members are required to be members of the executive branch, and the Governor has veto power over the board's actions. N.J. Stat. Ann. § 27:25-4. I agree with the majority that this distinguishes this case from *Kovats*. But this case is also distinguishable from cases in which agencies were found to be alter egos of the state. In *Port Authority*, for example, in addition to being subject to gubernatorial veto, the agency could not embark on new projects without the authorization of both the New York and New Jersey legislatures. 819 F.2d at 417. NJT falls between the cracks of the prior cases. Although not "highly autonomous" like *Rutgers*, NJT is

significantly autonomous. Since the degree of control by the governor is fairly substantial, in the end I think that this factor counsels in favor of according immunity to NJT, but only with modest force.

IV. STRIKING THE BALANCE

Since 1890, the eleventh amendment has been construed to entitle states to immunity from suit in federal court. *Hans v. Louisiana*, 134 U.S. 1 (1890). The amendment is intended to provide a partial solution to "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279, 294 (1973) (Marshall, J. concurring). The amendment's general purpose is to foster the states' autonomy. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 n.11. (1984). This court has attempted to effectuate the amendment's purpose by application of the factors listed in *Urbano*. In this case, the most important *Urbano* factor – whether the judgment would be paid by state funds – provides extremely strong indication that NJT is not the alter ego of New Jersey. Other factors – NJT's treatment under state law, and its degree of autonomy – provide only weak support for the conclusion that NJT is New Jersey's alter ego.

On balance, therefore, I believe the correct conclusion is that NJT is not the alter ego of New Jersey, and thus that its subsidiary, NJTRO, is not entitled to eleventh amendment immunity.[8] This conclusion is consistent with

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[8] Because I so conclude, I need not reach the issue of whether Congress has abrogated NJT's sovereign immunity, or whether New Jersey has waived it.

my understanding of the eleventh amendment's central goal of fostering the states' autonomy. I would therefore reverse the judgment of the district court and remand the case for pretrial proceedings and trial.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOUIS D. ELLIS	:	CIVIL 86-378
v.	:	ORDER
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	:	FILED APR. 25, 1988

It appearing that proceedings in the above matter have been stayed pending the disposition of similar or related litigation in another court which may become disposition of the litigation here pending;

It is, on this 25th day of APRIL 1988, ORDERED that the clerk administratively terminate the action in his records, without prejudice to the right of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

/s/ Harold A. Ackerman
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GEORGE FEATHERMAN	CIVIL 86-583
v.	ORDER
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	FILED APR. 25, 1988

It appearing that proceedings in the above matter have been stayed pending the disposition of similar or related litigation in another court which may become dispositive of the litigation here pending;

It is, on this 25th day of APRIL 1988, ORDERED that the clerk administratively terminate the action in his records, without prejudice to the right of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

/s/ Harold A. Ackerman
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FELIX E. GUZMAN, Plaintiff, v. NEW JERSEY TRANSIT RAIL OPERATIONS, Defendant	Civil Action No. 86-799 *OPINION and ORDER* FILED APR. 6, 1988

APPEARANCES:

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BISSELL, *District Judge*

This matter is presently before the Court pursuant to the Report and Recommendation of the Honorable G.

Donald Haneke, United States Magistrate, that it be dismissed for lack of subject matter jurisdiction. Eleven other actions against the defendant New Jersey Transit Rail Operations, Inc. have been presented to the undersigned in the same fashion, as a result of consolidated proceedings before the Magistrate. *In re F.E.L.A. Cases*, Tr. Feb. 22, 1988. The Report and Recommendation has been predicated upon the decision of the Honorable Alfred M. Wolin of this Court in *Fitchik v. New Jersey Transit*, Civ. No. 86-3060 (Op. dated Jan. 26, 1988). Some plaintiffs' counsel have filed brief objections to the Report and Recommendation alleging that because *Fitchik* was wrongly decided and is under appeal it should not support dismissal of the case at bar. Robert E. Myers, Esquire, has submitted a brief arguing that the decision in *Welch v. State Department of Highways*, 483 U.S. 97 (1987), the catalyst for the *Fitchik* decision, should only be applied prospectively under the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Were the Court to adopt that reasoning, the present action would not be dismissed. After consideration of all the factors discussed in Chevron Oil, this Court determines that there is no reason to limit *Welch* to prospective application only. The eleventh amendment which precludes the present action in federal court is of no assistance to the defendant should it be sued in a New Jersey state court. Furthermore, an F.E.L.A. action may be brought in either a state or federal court. 45 U.S.C. § 56. Finally, even if an action were now to be commenced in state court more that "three years from the day the cause of action accrued," (*ibid.*), under New Jersey law the running of this applicable statute of limitations will have been tolled during the pendency of

the present action. *Galligan v. Westfield Centre Service, Inc.*, 82 N.J. 188 (1980). Mindful, however, that in *Galligan* the superseding state court action had been filed shortly *before* dismissal of the federal action for lack of subject matter jurisdiction, this Court wishes to afford to plaintiff herein the same opportunity if he has not already taken such action.

For the reason set forth above,

It is on this 6th day of April, 1988, ORDERED that:

(1) As supplemented above, the Report and Recommendation of Magistrate Haneke be and the same hereby is adopted and entered as this Court's decision in this matter;

(2) The within action be and the same hereby is dismissed, effective as of April 15, 1988 without further Order of this Court, without prejudice or costs, due to lack of jurisdiction over the subject matter.

/s/ J. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 6, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FELIX E. GUZMAN, Plaintiff, v. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant	Civil Action No. 86-799 (Hon. John W. Bissell) *REPORT AND RECOMMENDATION* FILED MAR. 10, 1988

This matter was placed on the calender for February 22, 1988 on the Court's own motion in the wake of the decision by the Honorable Alfred M. Wolin in *Fitchik v. New Jersey Transit*, (Civil No. 86-3060). All parties were provided with a copy of the *Fitchik* decision and were given the opportunity to submit written presentations and oral argument.

The attached transcript of the February 22, 1988 argument constitutes my Report and Recommendation that this case be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ G. Donald Haneke
G. Donald Haneke
United States Magistrate

(p.1) UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: F.E.L.A. CASES

Newark, New Jersey
February 22, 1988

TRANSCRIPT OF MOTION

BEFORE HON. G. DONALD HANEKE
UNITED STATES MAGISTRATE

APPEARANCES:

For the Plaintiffs: Reitman, Parsonnet, Maisel & Duggan
By VICTOR J. PARSONNET, ESQ.,
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Coffey & Kaye
By THOMAS M. WARD, ESQ.,
Fitchik

Marvin I. Barish
By ROBERT E. MYERS, ESQ.
Stigliamo, Roxas, Duffy Geczi, Harden and Hogan

Court Reporter: NANCY E. FREITAS, C.S.R.
75 South Orange Avenue
South Orange, N.J. 07079

Pursuant to Section 753, Title 28, U.S. Code, the Following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

/s/ Nancy E. Freitas, C.S.R.
Nancy E. Freitas, C.S.R.

Proceedings recorded by mechanical stenography, transcript produced by computer transcription.

(p.2) Appearances: FRANCIS BALDO, ESQ., Ghobrial

JOHN R. SAVOTH, ESQ., Brito

JOSEPH SMUKLER, ESQ., Nebus

ROBERT ROSS, ESQ., Martin

For the Defendant: W. CARY EDWARDS, ATTORNEY GENERAL
By EMERALD L. ERICKSON, Deputy Attorney General

(p.3) THE COURT: I'd like to take these F.E.L.A.. matters first. For the record, it will take a little while to put all these names and numbers on the record, but I think fairness requires that I do so.

We are here today pursuant to the Court's own instructions on the following cases: Martin against New Jersey Transit, which is 86-4937; Hogan against New Jersey Transit, which is 86-4898; Ghobrial against New Jersey Transit, which is 86-584; Kinnear versus New Jersey Transit, which is 86-802; Banta against New Jersey Transit, which is 86-3413.

Now, those cases that I just mentioned are presently assigned to Judge Wolin in the District Court. We are also her on the following cases which are assigned to Judge Bissell. Brito, B-r-i-t-o, versus New Jersey Transit, 85-224; Nebus, N-e-b-u-s, against New Jersey Transit, which is 85-3481; Guzman, G-u-z-m-a-n, versus New Jersey Transit, 86-799; Roxas, R-o-x-a-s, versus New Jersey Transit,

86-2222; Spinelli versus New Jersey Transit, 86-3771; Malette, M-a-l-e-t-t-e, versus New Jersey Transit, 86-3774; Heaton, H-e-a-t-o-n, verses New (p.4) Jersey Transit, 86-4829; Duffy against New Jersey Transit, 87-1284; Williamson against New Jersey Transit, 87-1322; Geczi, G-e-c-z-i, versus New Jersey Transit, 87-1336; McKenna versus New Jersey Transit, 87-1534; Harden, H-a-r-d-e-n, versus New Jersey Transit, 87-2187; Stigliano, S-t-i-g-l-i-a-n-o, versus New Jersey Transit, 87-2730; Stocker, versus New Jersey Transit, 84-4244; and Seamon, S-e-a-m-o-n, versus New Jersey Transit, 87-4688.

Now, I have been informed this morning that the Spinelli and Malette matters have been settled; is that correct?

A VOICE: That's correct.

MS. ERICKSON: Yes, your Honor.

The Court: We will enter the appropriate 60-day orders so we don't have to have any debate about that. I would like to point out for the record that after the Court sent out its notice, which took place on various days, the majority of days was on January 28 there were a couple of others that came along a few days thereafter, pointed out that I expected any written submissions that the parties wanted to submit by the 15th of February, I got responses (p.5) from two. I have two responses, one on the Brito case, B-r-i-t-o, which was a request that we stay all further proceedings in these cases because of the possibility of an appeal in the Fitchik, F-i-t-c-h-i-k, case which was decided by Judge Wolin and which prompted all of this. And the other was a letter in the Dennis Martin case from Mr. Ross on behalf of the plaintiff, which expressed his

concerns about the possible statute of limitations problems. Those are the only people I've heard from.

Now, did anyone else here sent something that I didn't get?

MR. MYERS: Your Honor, I didn't send anything in, but I want to inform you another case was settled, Edward Geczi, G-e-c-z-i, Civil Action Number 87-1336.

THE COURT: Thank you.

Who would like to be heard?

MR. SAVOTH: Your Honor, in the Brito, John Savoth for plaintiff.

THE COURT: Come on up.

MR. SAVOTH: As you stated, you received a letter from Mr. Keller concerning plaintiff Mr. Brito.

(p.6) THE COURT: Right.

MR. SAVOTH: I would just like to restate that request, your Honor, for a stay of proceedings. I have been informed that the Fitchik case has been placed on appeal and it is our position that instead of dismissing the whole lot of them at this time that we could put them in, your Honor, you can put them in a stay situation until the Third Circuit finally determines its highly relevant issue to all the cases involved, instead of all parties, specifically us, having to switch over to state court and possibly in the future our rights being reinstated under the federal law.

THE COURT: I understand what the request is. It's denied, but I understand what it is.

MR. SAVOTH: Thank you, your Honor.

THE COURT: There were a couple of other hands that went up, isn't it Mr. Smuckler?

MR. ROSS: No, I am Mr. Ross.

THE COURT: I beg your pardon.

MR. ROSS: Your Honor, I did submit a brief letter in which your Honor is familiar with and which your Honor called me about.

(p.7) THE COURT: Yes, I did, and I think the record should reflect that conversation, because normally it's not my practice to call lawyers and speak to them individually, but in this case because of the importance of the issue that you raised in your letter I felt that it was appropriate to do so.

For the benefit of the rest of you folks, Mr. Ross sent a letter in which he expressed his concern that if the Court dismissed the federal actions and the plaintiffs then reinstituted actions in the state courts, that the fear would be that the defendant would then assert a statute of limitations defense, and Mr. Ross went to say, and I think correctly so, that that didn't seem fair to have plaintiffs potentially whipsawed out of both courts because of the Welsh decision in the Supreme Court and Judge Wolin's following of it in Fitchik.

I called Mr. Ross because I thought that it was my obligation to do so as the judge of the law, simply to point out that perhaps as a Pennsylvania practitioner, with due respect to him, he may not have been aware of a case called Galligan, G-a-l-l-i-g-a-n, versus Westfield Center (p.8) Services, Incorporated, which is a New Jersey

Supreme Court case from 1980 and which is reported at 82 New Jersey 188; which case, in my view, rather convincingly and emphatically makes it clear that any attempt by the State of New Jersey in this case to assert a statute of limitations defense against a reasonably promptly filed action in the state court would be destined to fail.

Galligan is a case in which a person filed a suit, personal injury case, in the Federal Court, alleging diversity of citizenship. As it happens, there was not diversity of citizenship and the Federal Court dismissed the claim. By the time that the person had refiled his action in the state court, the applicable statute of limitations had expired and that case it was two years and the F.E.L.A. cases, as we all know it, would be three.

The defendant in the state action in Galligan interposed a statute of limitations defense, the lower court agreed and on ultimate appeal the New Jersey Supreme Court said in effect, nothing doing, because the same parties were involved in the federal forum, the defendant had been placed on timely notice that this person (p.9) was asserting this claim arising out of this incident against it and that the statute of limitations should in effect be equitably tolled during the period of time when the action was pending in what turned out to be the wrong court.

In my view, that is precisely the situation with which we are confronted. If the Court dismisses these cases, and although I'll give the state to say whatever they want to say on it and what I say isn't binding on the state court, in my view a statute of limitations defense in any state action in these cases is destined to fail instantaneously.

Perfectly obvious to me that it will. So I felt that the better part of honor was to call Mr. Ross and point out the existence of that case, and I'll now give him the opportunity to address the rest of us on the subject of his concern.

MR. ROSS: I very much appreciate your call, sir. I have read the Galligan case and there is one point in the Galligan case which gives me some trouble and which I think may perhaps distinguish it factually from the Martin case.

THE COURT: Okay.

(p.10) MR. ROSS: And that is that in the Galligan case the plaintiff went into state court prior to being bounced out of the Federal Court. Now, there is a California case cited apparently with approval –

THE COURT: Yes.

MR. ROSS: – by the New Jersey Supreme Court and that gives me some small measure of comfort, but doesn't give me a dosage, doesn't put me totally at ease and I'm somewhat concerned about it. The difficulty I have, really, Judge, is that in reading Judge Wolin's opinion, in the very first paragraph he refers to the absence of undue prejudice by his determination, and I am quite frankly puzzled because in the Fitchik case there was not – there is not a statute of limitations problem.

In those cases in which there is a statute of limitations problem it would seem to me that Judge Wolin perhaps might have ruled differently, otherwise, I don't – I am unable to understand why he refers to the absence of undue prejudice by his determination. On the other hand,

I know that if there's a lack of subject matter jurisdiction, it's not a matter – absence (p.11) of prejudice or the presence of prejudice is really irrelevant, as I understand it from my law school days.

THE COURT: I understand. Who is here for the state?

MS. ERICKSON: Your Honor, I am, Emerald L. Erickson, Assistant Attorney General.

THE COURT: As long as we're having a free-wheeling discussion, which it should be in a matter of this significance, the Court, not only myself, but a number of other people in the Court, I know Magistrate Hedges suggested at several times, I am sure Magistrate Chesler did, I don't want to put you on the spot, Miss Erickson, but I might be about to do it, anyway –

MS. ERICKSON: I'm sure you are, your Honor.

THE COURT: –but it's not malevolently intended, but it's a matter of some curiosity to those of us on this Court why the state would not agree that anyone who took a voluntary dismissal in these federal actions with an agreement, let us say, to refile within 30 days, 45 days, some date that we could pick upon consultation with one another, that the dismissal (p.12) in the Federal Court would be without prejudice to reinstituting a case within state court within that period of time with return of which, state would agree, but of Galligan not because I say so, not to assert a statute of limitations defense because it's perfectly obvious that it won't work.

Now, I understand that at one point prior to the turn of the year we were within the proverbial eyelash of

getting an agreement like that and then for some reason unknown to me it became unraveled, but I'm a little curious as to your view on what I've said on Galligan.

MS. ERICKSON: Actually, your Honor, I don't think you're interested in my view. I think you're interested in my office's position.

THE COURT: Okay, I appreciate the distinction that is being made.

MS. ERICKSON: And I will say to you at this point that we will not waive any statute of limitations defenses, or any defense we may have to F.E.L.A. applying to the state-run railroad, however, the issue as to raising the statute of limitations defense is being studied by my office and will continue to be, so it is my understanding (p.13) that until we have finally decided and that the Attorney General makes that decision, that we will continue to plead it, but perhaps may not move to dismiss on those grounds in state court until that decision is made.

However, I would point out to your Honor, as you so clearly spoke a few moments ago the issue of the statute of limitations and its application by the state court has no bearing in front of you right now, except —

THE COURT; That's true.

MS. ERICKSON: — except in your attempt to get voluntary dismissals from plaintiffs. There is no subject matter jurisdiction before your Court, the state is entitled to the Eleventh Amendment immunity and for those reasons the whole subject of the statute of limitations has no bearing today to that.

THE COURT: If what you mean by that is that I don't have the say-so on it, your're right. But it definitely has a bearing in our thinking here on this court about how we are going to go about handling these cases. I did the statute of limitations research by myself, because as a matter of fundamental fairness I have to tell (p.14) you that the thought occurred to me why we would want to throw out all these cases if it's going to create a statute of limitations problem, when the people who filed in Federal Court initially thought, with good reason under the Parden case, that they were filing in a place that had proper jurisdiction. I know that I don't rule on it, because that's the matter for a state court judge to do when and if the state decides to impose the defense. I just thought I ought to mention it, because in my view if you try it your're going no place, that's just — take that opinion for what it's worth. It almost violates the rule against advisory opinions, but in this kind of circumstance I think it needed to be mentioned for the record because I think this statute of limitations defense will go exactly as far as that wall to your right if it's asserted.

I know the Attorney General has to make up his mind and that's his privilege, but.

MS. ERICKSON: Thank you, your Honor, I will pass on that information.

THE COURT: Okay. I appreciate it. I am not telling Mr. Edwards that he has to listen to me, but he might want to read Galligan against (p.15) Westfield Service Centers before he makes his judgment. I understand your position very clearly.

There was another hand up.

MR. WARD: Your Honor, Tom Ward from Coffey & Kaye, we are the firm in the Fitchik case. I want to inform the Court we did in fact file a notice of appeal on February 18, take that to the Third Circuit and we do intend to take Fitchik all the way to the Supreme Court, if possible, as far as the Supreme Court allows us to do so.

If your Honor — I'd like to propose this to your Honor and to the Court that if there are going to be dismissals in these cases that possibly the Court could save the attorneys involved some work and list the cases per law firm, for instance, In Re: Cases of Coffey & Kaye, or whoever, and list the cases and dismiss them as I don't know how you would do it, consolidated order of dismissal, instead of having individual dismissals in each case and causing multiple appeals in this case.

THE COURT: I understand the suggestion, I appreciate what motivates it, but I (p.16) think that would present a big problem internaliy within the Court. I will say this, also, as I'm sure you're all aware, I have no authority myself to dismiss any of these. My intention after today's proceeding is to send my views by way of report and recommendation to the two District Judges who have the matters on their calendars and then, as in every other case where a Magistrate issues a report and a recommendation, the people who object to it are free to comment within ten days of their receipt and the District Judge has the ultimate say-so of whether the case is going to be dismissed. I have only set it up this way because Judge Bissel and Judge Wolin and I in consultation with one another thought it would be the most expeditious way to bring some 20 odd cases that have obviously the same issue.

The way I intend to do it is after we hear your oral presentations to say I'm basically going to dictate what my recommendation is, order the transcript and certify the transcript as what my recommendation is and you'll all be mailed a copy of that by the Court so that then when you get it you have your opportunity to take whatever position you want to take with the District Judge, (p.17) procedurally that's the way it's going to happen.

I understand you're unhappy with Fitchik, you're perfectly within your right to take it all the way up. If they give you cert on it, God bless you. I promise not to be annoyed if that happens.

MR. WARD: Thank you.

THE COURT: Anyone else who wants to be heard? Does the absence of other people wanting to be heard mean that they don't object to dismissals.

MR. MYERS: If your Honor please, Robert Myers, law office of Marvin Barish.

THE COURT: I thought that would produce a reaction.

MR. MYERS: On the Stigliano, Roxas matters, Duffy, Geczi, as I said, has been settled. The Harden matter and Barbara Hogan, that would not be our intention, in fact, we would join with other counsels' argument, particularly as it relates to the cases that are affected by the statute of limitation, since the Welsh decision came down in June and we did not get a motion of dismissal until six months later, I think it greatly prejudices some plantiffs. (p.18) However, none of the cases I

have in the list before your Honor today have been affected by the statute of limitation.

I would just make one final request, since there is going to be no agreement by the state today concerning stay of all matters, perhaps your Honor would consider plaintiff's counsel earlier suggestion that these matters in fact be stayed pending the outcome of the Fitchik case before the Third Circuit, so if there is going to be some sort of prejudice, at least it will be some sort of definitive answer, hopefully by the Full Circuit Court on this issue.

THE COURT: I have found in my time on the bench that candor invites candor, and I have to tell you that a stay is a matter that I talked about to some of my District Court mentors, and they are not enchanted with the idea.

MS. ERICKSON: Your Honor, I'm sorry, I just wanted to correct something that Mr. Myers has said. Nothing that I have said today, I hope, has been construed that the state is failing, to agree to a stay of all matters, we take no position on that.

THE COURT: I understand that. If (p.19) you'll permit me to give you my views, I think Fitchik was correctly decided, and is destined to be affirmed. Myself, I don't think there's any real question about it at all, in view of what the Supreme Court Justice has said in the Welsh case. The only wrinkle in Welsh that I can see is that the decision is arrived at by adding up three plurality people and one concurring an opinion of Justice Scalia, which happens to go on and said that specifically that he agreed with something that the other four said, so you have five people saying the same thing.

I think, with due respect to the gentleman who's going to appeal it, I think the Circuit is probably going to be affirmed, I have been mistaken before. I thought Mondale would win too, so you have to take my predictions with a sizable grain of salt.

A VOICE: I won't ask you who's going to win this time.

THE COURT: If I predict him then he's in a lot of trouble.

MR. SMUCKLER: In order that my silence won't be deemed assent, we have one case, I'm Joe Smuckler, we have one case, the Haden (p.20) Nebus case, 85-3481, in which the statute just ran two months ago, and I will voice the views that were heard before your Honor on that issue of where the statute has run.

THE COURT: Okay. Before we go any further, can I ask for you to identify to me which ones do have statute problems. I know your's, Smuckler for Nebus.

We know that Martin, Dennis Martin, Mr. Ross has spoken to the issue already, so we know his falls into that category; who else's?

MR. WARD: Your Honor, Stocker, 84-4244, Guzman, 86-0799, Banta, 86-3413.

MR. SAVOTH: Your Honor, Brito 85-224.

THE COURT: Who else, just those? We have half a dozen cases represented here today that have a statute problem, right? Nebus, Martin, Stocker, Banta, Brito and Guzman, right, did I leave anybody out? No. Okay. Now, off the record for a minute.

(Discussion held off the record.)

THE COURT: Are you addressing the cases in general?

MR. BALDO: I'm addressing the (p.21) Ghobrial case in particular. Your Honor, the Fitchik opinion seems to state that the Welsh case has decided that there was no abrogation and that there was no waiver in the F.E.L.A. context. My suggestion is that the Welsh case only decided the issue of abrogation as opposed to waiver. I think careful reading of the opinion shows that the question of waiver on the part of the defendant in that case and by analogy in this case was expressly excluded from the Court's consideration. Abrogation is what Congress did and I think that's what Welsh is grounded on.

Secondly, I suggest to you that Welsh did not decide, even though it's grounded on abrogation of Congress, what Congress did, it focuses on the Jones Act and I think there is a difference, the Jones Act uses the remedial provisions of the F.E.L.A., it does not focus on the jurisdictional language of the F.E.L.A., which is different in its focus, in its history, in its policy, and I think that we are entitled, perhaps a decision, the result would be the same, but I feel we are entitled to an analysis of the F.E.L.A. statute itself, as opposed to simply incorporating the Welsh decision as being (p.22) controlling, since it applies with the — applies only to the Jones Act, only applies to the abrogation issue and significantly Justice White's concurring opinion mentions the Petty case, which specifically upheld a Jones Act case in state court where the defendant had this magic language, had consented to be sued or to sue.

THE COURT: Can I interrupt you for a minute?

MR. BALDO: Sure.

THE COURT: I would have appreciated a written submission on this if you were going to make this kind of extended argument. I gave you, I thought, a fair notice that arguments that you wanted to make ought to be submitted in writing by February 15th and I'm a little aggravated that you're giving me an extended presentation with no prior notice of what it's about, I am not going to prevent you from finishing.

MR. BALDO: I apologize.

THE COURT: I expected a meticulous submission and I didn't get any from you.

MR. BALDO: That's correct, your Honor, and I apologize for that fact. I am preparing a brief on the issues which will be (p.23) submitted by the end of this week, if that's – if that's too late I understand.

THE COURT: I told you that I wanted written submissions on the 15th. Now, I'm prepared to hear you out orally, but I'm not going to wait any longer for briefs, and I would also point out to you that under our Court Rules if you didn't submit a written argument to the Magistrate at this level you better not try to submit that argument in writing to a District Judge if you're objecting to a report and recommendation, because that's known as sandbagging the Judge and is generally frowned on by me, not to mention the District Judge.

MR. BALDO: That wasn't my intent.

THE COURT: I wanted to alert you.

MR. BALDO: I am almost finished. I simply wanted to point out that there are these two distinct issues in the Welsh case that the Fitchik decision does not seem to address, namely, that Welsh is grounded only in abrogation, does not even address or does not consider the question of whether the defendant had waived its defense – the Eleventh Amendment defense, and secondly, that (p.24) the Justice White's concurring opinion which mentions the Petty decisions, I simply recommend that to your Honor for your consideration.

THE COURT: Okay. Miss Erickson, do you want to respond?

MS. ERICKSON: Your Honor, I'll take your advice about not discussing matters that weren't submitted in writing. I would point out, however, that before Judge Wolin was the issue of the state's waiver or non waiver of the Eleventh Amendment, and we of course contend, as we did before Judge Wolin, that under no circumstances has New Jersey Transit ever waived its Eleventh Amendment immunity, except for the limited matter in the limited amount of time when the Parden decision of the United States Supreme Court appeared to give us no choice.

THE COURT: Okay. I am not going to repeat the names of all of the cases because I listed them at the beginning, but – nor am I going to repeat the procedural history of how the matters came to be before me, because that has already been stated for the record. I would say that obviously what I'm about to say does not apply to cases that have been reported settled.

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EDWARD MC INTOSH, Plaintiff	:	Civil Action No. 86-2536
vs.	:	Filed Apr 6, 1988
PORT AUTHORITY OF NEW YORK & NEW JERSEY, and MIKE TAGLIETTA Defendants	:	
WERNER O. QUAST, Plaintiff	:	Civil Action No. 87-36
vs.	:	
PORT AUTHORITY TRANS-HUDSON CORP., (PATH) Defendant	:	
PATRICK J. MUELLER, Plaintiff	:	Civil Action No. 87-932
vs.	:	
NEW JERSEY TRANSIT-RAIL OPERATIONS, INC., Defendant	:	
LEONARD BENITEZ, Plaintiff	:	Civil Action No. 87-1365
vs.	:	
PORT AUTHORITY TRANS-HUDSON CORP., (PATH) Defendant	:	

DANIEL J. O'CONNELL, Plaintiff vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant	:	Civil Action No. 87-1716
EDWARD J. FLILLER, Plaintiff vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant	:	Civil Action No. 87-1862
LAURENCE O'HALLORAN, Plaintiff vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant	:	Civil Action No. 87-2266
CRAIG A. CONLON, Plaintiff vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant	:	Civil Action No. 87-4689 *O P I N I O N*

BARRY, District Judge

In June of 1987, a majority of the Justices of the Supreme Court of the United States held, in *Welch v. State*

Dept of Highways and Public Transportation, 107 S.Ct. 2941 (1987), that to the extent that *Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964) was inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress be expressed in unmistakenly clear language, *Parden* was overruled. By opinion and order filed January 26, 1988, the Hon. Alfred M. Wolin concluded that, based upon *Welch*, he lacked subject matter jurisdiction over the case before him, finding the significance of *Welch* to be "that although the Jones Act [46 U.S.C. § 688] applied the remedial provisions of the FELA [Federal Employer's Liability Act, 53 Stat. 1404, 45 U.S.C. §§ 51-60] to seaman [sic], a majority of the court recognized that in neither of these pieces of legislation did Congress expressly abrogate states' immunity." *Fitchik v. New Jersey Transit Rail Operations*, ___ F.Supp. ___, Civ. No. 86-3060 (D.N.J., filed Jan. 26, 1988), sl. op. at 7-8.

As a result of *Welch* and *Fitchik*, several and perhaps all of the judges of this court are reviewing the FELA cases assigned to them. Before me now, variously on Orders to Show Cause or Motions to Dismiss for lack of subject matter jurisdiction, are eight such cases. The defendant in each case is either New Jersey Transit Rail Operations, Inc. or the Port Authority Trans-Hudson Corp. (PATH), the Port Authority of New York and New Jersey's wholly owned subsidiary. New Jersey Transit Rail Operations, Inc. is concededly the arm or alter ego of the State of New Jersey and PATH of New York and New Jersey. All plaintiffs were employees of one of those defendants at the time of the incidents upon which they sue.

I find no persuasive reason why *Welch* and *Fitchik* should not be applied to the FELA cases pending before me and thus reach the same conclusion as Judge Wolin for the reasons expressed in his opinion. The decision as to whether some or all of these cases should be dismissed, however, is dependent upon whether *Welch* is to be applied retroactively or prospectively, an issue not addressed in *Welch* or *Fitchik* and not raised by any party before me, although the parties have been given the opportunity to submit briefs on this issue, and have availed themselves of that opportunity.[1]

Resolution of the issue of retroactivity v. prospectivity is easily reached: "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).[2] Eleventh

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[1] *Fitchik* is now on appeal to the Court of Appeals for the Third Circuit. It would seem appropriate that my decision should be before the Court of Appeals to be consolidated with the *Fitchik* appeal so that the court may consider, if it wishes, the brief discussion of retroactivity versus prospectivity that will follow.

[2] Plaintiffs would have me limit *Firestone Tire & Rubber Co.* to say "merely that an appellate court cannot decide the merits of an appeal over which it does not have proper jurisdiction" unless "the appellant would otherwise be foreclosed from obtaining review on the merits." Br. of Plaintiffs Mueller, Benitez, Fliller, at 3, n.3. *Firestone* implies no such limitation, as other courts have recognized. *See, e.g. United States v. Kimberlin*, 776 F.2d 1344, 1346 (7th Cir. 1985). Moreover, as will be made clear, plaintiffs will be heard on the merits in another forum.

Amendment immunity "partakes of the nature of a jurisdictional bar." *Welch, supra*, 107 S.Ct. at 2947, n.6, quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). *A fortiori*, I have no jurisdiction over the cases pending before me and, thus, no discretion to consider the merits of those cases.

But jurisdiction aside, "It is a time honored principle that courts will apply the law in effect at the time they decide a case. *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). As a result, a recent decision is generally applied even to a dispute that arose prior to the court's holding." *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 943 (3d Cir. 1985) (footnote omitted). Where, however, inequitable results will flow from the application of this retroactivity precept, courts may determine not to apply a decision retroactively. *Id.* at 943-44.

Applying the familiar *Chevron Oil* (*Chevron Oil v. Huson*, 404 U.S. 97 (1971)) considerations to the cases before me, it is quite clear that there should be no deviation from the general rule. Under *Chevron Oil*, three considerations bear upon the issue of whether a holding is to be retroactively or prospectively applied.[3] First, a holding

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[3] The parameters of "retroactive" and "prospective" are somewhat murky. Thus, one can conclude that a holding should be applied retroactively, but whether that retroactive application should extend merely to pending cases or whether it should extend further to include cases in which judgments have become final is not easily susceptible of resolution nor one I need decide. And one can conclude that a holding should be applied prospectively but whether "prospective" should or should not include even the case in which the holding is reached is not as clear as one would wish.

to be applied prospectively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. Second, consideration must be given to whether a retroactive application will further or retard the operation of the holding in question. Third, consideration must be given as well to whether retroactive application could produce substantial inequitable results in individual cases. *Chevron Oil*, 404 U.S. at 106-07.

With reference to the first consideration, a majority of the Court in *Welch* recognized the continued validity of the Court's unanimous decision in *Hans v. Louisiana*, 134 U.S. 1 (1890) which, as relevant here, established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. As Justice Powell wrote, "the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence", with "the doctrine of sovereign immunity play[ing] a vital role in our federal system", "adhered to without exception by this Court for almost a century" with "*Hans* . . . reaffirmed in case after case." 107 S.Ct. at 2952-53, 2956 and n.27. Similarly the court has required, before and after *Parden*, that Congress "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself". *Id.* at 2946. The result in *Parden*, in which such "unmistakable language" was not deemed necessary and the mere operation of a common carrier railroad in interstate commerce by a state was deemed to constitute a waiver of that state's sovereign immunity and consent to suit brought in a federal court by employees of the railroad under the FELA, was

summarily dismissed as having been reached by a mistaken reliance on cases which did not support the Court's holding on the Eleventh Amendment issue. *Id.* at 2947 and n.7.

Moreover, the *Welch* majority took no issue with the conclusion of the Court of Appeals that, although *Parden* had not been expressly overruled, it had "overtly been limited by later decisions as its full implications . . . surfaced". *Id.* at 2944. Importantly, the majority itself concluded that the Court's cases subsequent to *Parden* "leave no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law" for in those cases "the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Id.* at 2948. See *Alascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*); *Quern v. Jordan*, 440 U.S. 332 (1979); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279 (1973). To the extent that *Parden* was inconsistent with that requirement, *Parden* was explicitly overruled.

Thus, a new principle of law was not established by the holding in *Welch*, even though the aspect of *Parden* relevant here was overruled, and an issue of first impression was not decided, much less an issue not clearly foreshadowed by earlier cases. It is clear, of course, that litigants – mistakenly or otherwise - relied on *Parden* given the large number of FELA cases pending in the federal courts. It is also clear that those litigants have a remedy, albeit not in this court.

With reference to the second *Chevron* consideration, retroactive operation will advance the operation of the holding in *Welch*, not retard it. It must be remembered that what is at issue here is the very power of a court to adjudicate, rather than merely a particular issue of law to *be* adjudicated. Thus, if a court lacks jurisdiction because a decision binding on that court says so, it follows that the court cannot be deemed to have jurisdiction merely because of the fortuity of the date on which a particular matter was filed, any exegesis into retroactivity versus prospectivity notwithstanding. *See Firestone Tire & Rubber Co., supra*. Stated somewhat differently, it would defy common sense, not to mention law, to conclude that I have subject matter jurisdiction over those cases filed before June 25, 1987, the date of the *Welch* decision, but no subject matter jurisdiction over those cases filed thereafter. Jurisdiction is jurisdiction and *Welch* tells me that I do not have it and never did. It would "advance the operation" of the holding in *Welch* to say so.[4]

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[4] In *Marathon Oil v. Northern Pipeline*, 458 U.S. 50 (1981), where Congress' grant of jurisdiction to the bankruptcy courts could not be sustained and where the Court determined that its holding should be applied prospectively only and its judgment stayed, the recognition of lack of jurisdiction in the bankruptcy courts resulted in an immediate change whereby the district courts, in response to the recommendation of the Judicial Conference of the United States, adopted local rules for the processing of bankruptcy and bankruptcy related cases with the orders entered in related proceedings deemed to be orders of the district courts, not of the bankruptcy courts. Interestingly, while reciting the nonretroactivity holding of *Marathon*, the Third Circuit determined that there was no hardship in a retroactive application of the *Marathon* holding in the

(Continued on following page)

Finally, at least in the vast majority of individual cases, "substantial inequitable results" should not eventuate. Justice Powell discussed this very point, albeit with reference to Jones Act cases, noting that relief may often be obtained through suits against state officials rather than the state itself or through injunctive or other prospective remedies and that states may provide relief by waiving their immunity from suit in state court on state court claims. Ms. Welch's ability to file a workers' compensation claim against Texas under the Texas Tort Claims Act was deemed sufficient. *Id.* at 2953 and n. 19.

One does not have to look for a remedy here beyond the words of the FELA itself which provides, at § 56, that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states, a provision not found in the Jones Act. Certainly, the Supreme Court of the United States has from the inception of § 56 consistently recognized the ability of an employee to sue his state-operated railroad in state court under the FELA; certainly, too, the State of New Jersey has over those many years not concluded to the contrary. And if the cases now pending before me are refiled in state court, it seems clear that principles of equitable tolling should be applied were the bar of the statute of limitations to be raised. Cf. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

(Continued from previous page)

case before it because the case had not yet been tried, and when it was tried, it would be tried in the district court, not in the bankruptcy court. *Coastal Steel v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 199 (3d Cir. 1983).

One final observation. Defendants have threatened that, based upon *Welch*, they may well move to dismiss all FELA actions pending in the state courts. I find utterly nothing in *Welch* which would support such a motion. If I am wrong, however, I would anticipate that the state courts would be compelled to apply *Welch* prospectively only, thereby providing plaintiffs with the remedy that defendants may seek to deny them.

The actions pending before me are regrettably but necessarily dismissed for lack of subject matter jurisdiction.

/s/ Maryanne Trump Barry
U.S.D.J.

Dated: April 6, 1988

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LINDA A. DE GIROLAMO, Plaintiff, vs. NEW JERSEY TRANSIT AUTHORITY, d/b/a NEW JERSEY TRANSIT, Defendant.	:	CIVIL NO. 86-3901(GEB) *MEMORANDUM and ORDER* Filed Mar 22, 1988

BROWN, District Judge

This matter is before the Court on defendant's motion for dismissal due to a lack of jurisdiction. The material facts giving rise to this controversy are as follows: In November 1983, plaintiff, employed as a conductor for defendant railroad, was travelling aboard one of defendant's trains when she slipped and fell. Plaintiff alleges that her mishap and resulting injuries were due to defendant's negligence and carelessness, and initiated this action in October 1986, pursuant to the Federal Employers Liability Act, the Safety Appliance Act, and the Boiler Inspection Act.[1]

[1] The Federal Employers Liability Act 45 U.S.C.A. § 56 contains the only *general* provision regarding jurisdiction.

Based on the recent Supreme Court decision, *Welch v. State Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987)[2], defendant now moves for dismissal.

In *Welch*, the Court held that, in enacting the Jones Act, Congress did not abrogate Texas' sovereign immunity under the Eleventh Amendment. Prior to that decision, individuals were able to maintain actions against the state under FELA and the Jones Act pursuant to *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964).

Parden concerned an employee of a state owned railroad suing the state in federal court under FELA, and as stated in *Welch*, "the Jones Act applied the remedial provisions of the FELA to seamen". *Welch*, 107 S.Ct. at 2945. In *Welch*, the Supreme Court explicitly overruled *Parden* insofar that it "is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Id.* at 2948. FELA does not contain the explicit abrogation of immunity required in order to defeat the Eleventh Amendment bar. *See United States v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), where the Third Circuit recently discussed whether the Comprehensive Environmental

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[2] Although *Welch* was decided after this action was initiated, there is no concern regarding retroactive application as Fed.R.Civ.P. 12(h)(3) states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the Court shall dismiss the action." *See also Fitchik v. New Jersey Rail Operation*, 86-3060 (D.N.J. January 26, 1988)(available on Lexis)(case dismissed pursuant to *Welch* "after the entry of the final pretrial order and one week in advance of the scheduled trial date.").

Response, Compensation, and Liability Act (CERLA) waived Eleventh Amendment immunity and stated:

> *Welch* overturned, at least in part,[3] the decision in *Parden* in which the Court had found that Congress had intended to abrogate states' Eleventh Amendment immunity when it enacted FELA and regulated "every common carrier engaging in commerce between any of the several states". (citation omitted). "Every common carrier," held *Parden* included state-owned railroads and thus abrogated their eleventh amendment immunity. *Welch* explicitly overruled this holding in *Parden*, interpreting the very same provision of the FELA as it was incorporated by reference into the Jones Act.

Id. at 1346-47. *See also Laughinghouse v. North Carolina Ports Railway Commission*, 87-81 (D.N.C. February 9, 1988)(available on Lexis), where the Court held:

> There is, therefore, little doubt that *Welch* mandates an eleventh amendment bar to all claims by injured railway workers against employer state agencies in federal court. 107 S.Ct. at 2968 (Brennan, J., dissenting)("The Court today overrules, in part *Parden* . . . It rejects the holding in *Parden* that Congress evidenced an intention to abrogate Eleventh Amendment immunity [in the introductory language to the FELA]. The Court instead concludes that Congress did not abrogate the sovereign immunity of states, because it did

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[3] The remaining aspect of the *Parden* decision concerns the Congress' "power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the states are engaged in interstate commerce". *Welch*, 107 S.Ct. at 2948 n. 8. This question is not implicated here; even if the Congress has the power, it did not do so in the FELA by the unmistakably clear language required. *See Laughinghouse v. North Carolina Ports Railway Commission*, 87-81 (D.N.C. February 9, 1988)(available on Lexis).

> not express this intent in unmistakably clear language.").

See also Fitchik v. New Jersey Transit Rail Operations, 86-3060 (D.N.J January 26, 1988) (available on Lexis), where Judge Wolin concludes:

> From *Welch, supra, we discern that a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the states' Eleventh Amendment immunity from federal suit;* that the general language of the Jones Act does not authorize suits against the states in federal court; *that the FELA does not authorize suits against the states in federal court;* and lastly the Eleventh Amendment prevents a state from being sued in federal court by one of its own citizens, unless the state itself consents to be sued.

There is no question that New Jersey Transit is an alter-ego of the state[4] and therefore entitled to assert the Eleventh Amendment bar. *See Blake v. Kline*, 612 F.2d 718, 721 (3d Cir. 1979), *cert. denied*, 447 U.S. 1112 (1980)("It is not necessary that the state be named as a party, only that the named party is, in actuality, the alter ego of the state.").

Plaintiff has not cited any statute that "unmistakably" abrogates the State's immunity. Moreover, the record is barren of any indication that the State has waived its

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[4] In *Fitchik v. New Jersey Transit Rail Operations*, No. 86-3060 (D.N.J January 26, 1988), Judge Wolin citing numerous cases, concluded that "New Jersey Transit and its progeny are the alter egos of the State of New Jersey and, therefore, immune from suit in the Federal Court." *See also Gibson-Homas Co. v. New Jersey Transit Corp.*, 560 F.supp. 110, 113 (D.N.J. 1982), where Judge Stern, in a detailed and often cited analysis concludes that New Jersey Transit is the alter ego of the State.

immunity. Plaintiff's arguments that the State has waived its immunity by its "failure to raise the defense at an appropriate stage of litigation and through the defendant's conduct which manifests amenability to suit in federal court," is without merit. Under the Eleventh Amendment defense this Court lacks subject matter jurisdiction. Unlike lack of personal jurisdiction, this defense is not waivable.

It is therefore ORDERED this 21st of March, 1988 that this action is hereby dismissed for lack of jurisdiction.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR. U.S.D.J.

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM ROCKWELL, Plaintiff,	Civil No. 84-4217
v.	*OPINION*
NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant.	FILED MAR. 24, 1988

APPEARANCES: CURRAN & HANNAWAY
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W. CARY EDWARDS,
Attorney General of New Jersey
Attorney for Defendant
By: Emerald L. Erickson, Esq.
CN-116
Trenton, New Jersey 08615

FISHER, District Judge

Before the court is a motion to dismiss the action for lack of subject matter jurisdiction brought by the defendant, New Jersey Transit Rail Operations, Inc. (hereafter "New Jersey Transit"). Specifically, defendant argues that the Eleventh Amendment of the United States Constitution bars the present suit.

The Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although the Amendment's literal terms encompass only suits by citizens of another state, this immunity extends as well to suits brought by a citizen against his own state in federal court. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890), *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

Notwithstanding the immunity, a state may be subjected to federal jurisdiction in one of two ways. First, Congress may override a state's immunity where it exercises its legislative powers to enforce the substantive provisions of the Due Process Clause of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). In *Atascadero State Hosp., supra*, the Supreme Court stated:

> Congress may abrogate the state's constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute. The fundamental nature of the interest implicated by the Eleventh Amendment dictates this conclusion.

Id. at 242. The second way in which a state may be subject to suit in federal court is where the state has waived its immunity. *Clark v. Bernard*, 108 U.S. 436, 447 (1883). A waiver of immunity, however, is not routinely found. Rather, a court will find such a waiver "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any

other reasonable construction." *Edelman, supra,* at 673, *quoting Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In general, the immunity afforded by the Amendment extends not only to cases where the state itself is a party to the suit, but also to suits against state agencies, instrumentalities and officers where the state is, in fact, the real party in interest. *Edelman, supra,* at 663. In this regard, I need only briefly address New Jersey Transit's right to claim immunity from suit under the Amendment. A number of cases have considered the issue and have concluded that New Jersey Transit is, in fact, the *alter ego* of the state government of New Jersey. *Gibson-Homans Co. v. New Jersey Transit Corp.,* 560 F. Supp. 110, 113 (D.N.J. 1982); *Saddle River Tours v. New Jersey Department of Transit, et al.* (No. 83-1776 D.N.J., October 31, 1983), *affirmed,* 745 F.2d 48 (3d Cir. 1984). Indeed, Rockwell offers no opposition on this point.

a. *Congressional Abrogation*

The question raised by this motion is whether a state, operating a railroad in interstate commerce, may be sued in federal court under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 1, *et seq.* The answer depends on to what extent the Supreme Court's decision in *Parden v. Terminal Ry. of Alabama Docks Dept.,* 377 U.S. 184 (1964), survives the Court's recent decision in *Welch v. State Dept. of Highways and Public Transportation, et al.,* 483 U.S. ___, 97 L. Ed. 2d 389 (1987).

In *Parden, supra,* the Court held that a state may be sued under FELA in federal court, notwithstanding a state's Eleventh Amendment immunity. The Court held:

> We think that Congress, in making the FELA applicable to "every" common carrier by railroad in interstate commerce, meant what it said. That congressional statutes regulating railroads in interstate commerce apply to such railroads whether they are state owned or privately owned is hardly a novel proposition; . . .

Id. at 188. On the issue of congressional intent to abrogate a state's immunity, the Court went on to say:

> If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees – those whose employers happen to be state owned – without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately-owned common carriers by railroad in interstate commerce.

Id. at 189-90.

There is no question that, after the Court's decision in *Welch, supra,* this aspect of the Court's holding in

Parden is no longer good law. In *Welch*, the Court stated that subsequent cases have uniformly held that Congress must unequivocally express its intent to override a state's Eleventh-Amendment immunity. *Id.*, 97 L. Ed. 2d at 399, *citing Atascadero, supra,* at 242; *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984); and *Quern v. Jordan,* 440 U.S. 332, 342-45 (1979). Thus, the Court held that "[t]o the extent that *Parden v. Terminal Ry., supra,* is inconsistent with the requirement that an abrogation of Eleventh-Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Welch, supra,* 97 L. Ed. 2d at 399. *See also U.S. v. Union Gas Co.,* 832 F.2d 1343, 1346 (3d Cir. 1987).

Because *Welch* held that the Jones Act did not express an unmistakable intention to abrogate Eleventh-Amendment immunity, Rockwell attempts to distinguish this motion inasmuch as the present case deals with FELA. In this vein, plaintiff argues that the Jones Act incorporates only the remedial provisions of the FELA, rather than the jurisdictional bases of the statute. The Jones Act, 46 U.S.C. § 688, extends to "any seaman who shall suffer personal injury in the course of his employment." The FELA is applicable to "every common carrier by railroad while engaging in commerce between any of the several states. . . ." 45 U.S.S. § 51. Thus, Rockwell contends that, while the Jones Act designates a class of plaintiffs, Congress, in enacting the FELA, specified a particular group of defendants which includes state-run railroads.

There is no distinction to be made between *Parden* and *Welch* based on Rockwell's argument. Rockwell relies on far too narrow a reading of *Welch*. Whether a state employs a seaman or a railroad worker, it is set apart

from other employers by virtue of its constitutional role in a federalist system. *Welch, supra,* 97 L. Ed. 2d at 398. Although *Parden* did not draw this distinction, a number of subsequent cases recognize the special status occupied by a state. *See Edelman, supra; Employees of the Dept. of Public Health and Welfare of Missouri v. Dept. of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973). *Welch, supra,* at 398. It was because the *Parden* court treated the state employer as it would have a private employer that the court concluded that, in view of the broad reach of the FELA, Congress could not have intended to exclude state workers from its coverage. Parden, supra, at 190. ("We shall not presume to say, in the absence of express provision to the contrary, that it [Congress] intended to exclude a particular group . . . from the benefits conferred by the Act.") The aforementioned subsequent line of Supreme Court cases, including, most recently, *Welch,* makes clear, however, that Eleventh-Amendment abrogation requires just the opposite. To wit, Congress must expressly state its desire to subject a state to federal jurisdiction. Thus, while *Welch,* in its literal terms, deals only with the Jones Act, its discussion concerning the abrogation of Eleventh-Amendment immunity is equally applicable to the FELA. As neither the Jones Act nor the FELA sets forth a clear and unmistakable intent on the part of Congress to abrogate a state's Eleventh-Amendment immunity, the plaintiff's argument must fail.

b. *Waiver*

In addition to the foregoing contentions regarding abrogation, Rockwell further argues that the State of New Jersey and New Jersey Transit have made it abundantly

clear that it has consented to suit in federal court. As noted above, a waiver requires either the "most express language" or "such overwhelming implications . . . as will leave no room for any other reasonable construction." *Edelman, supra,* at 673. Primarily, Rockwell points to 27 N.J.S.A. § 25-5, the New Jersey Transit enabling statute, which, among other things, empowers New Jersey Transit to "sue and be sued." In *Pennhurst II, supra,* the Court explained that "[a] state's constitutional interest in immunity encompasses not only *whether* it may be sued, but *where it may be sued.*" *Id.* at 99. For either a state statute or a provision of the state's constitution to rise to the level of a waiver of the state's Eleventh-Amendment immunity, the Supreme Court has made it clear that the particular provision relied on must indicate the state's specific intention to be sued in federal court. *Atascadero State Hosp., supra,* at 241.

Examining N.J.S.A. 27:25-5, there is nothing within the statute which specifies that either the State of New Jersey or New Jersey Transit has consented to be sued in federal court. In *Walker v. Transport of New Jersey,* 534 F. Supp. 719 (E.D. Pa. 1982), the court noted that the statute on which Rockwell relies does not operate as a waiver of sovereign immunity. Rather, the court noted, the statute simply "confers capacity to be sued." *Id.* at 720. Therefore, there is no clear and unmistakable waiver of sovereign immunity.

Rockwell also argues that the preamble to the union agreement among New Jersey Transit and the transport Workers Union of America and the Brotherhood of Railway Carman of the United States and Canada provides

further evidence that the defendant has waived its Eleventh-Amendment immunities in this context. The preamble states that one of the purposes of the Union agreement is to give recognition to the "historical rights and privileges of railroad employees." Rockwell contends that among those historical rights is a railroad worker's cause of action under the FELA. To accept plaintiff's argument that this rather general statement constitutes the clear and unmistakable evidence that the State has consented to waive its Eleventh-Amendment immunity requires a leap over a large barrier. The statement itself does not specifically include the FELA as one of the "historical" rights of railroad workers. Plaintiff has chosen not to submit the complete union agreement on which he relies, and, consequently, there is nothing before the court to suggest that remedies under the FELA are part of the rights embodied in the agreement. Accordingly, I conclude that there is insufficient indication that New Jersey Transit, by its actions, has waived its Eleventh-Amendment immunity.

c. *Equal Protection*

Finally, Rockwell argues that "if he cannot enforce his rights in a federal court while other railroad employees can do so" he is denied equal protection of the law. This rather curious argument is premised on the fact that Congress passed FELA in its power to regulate interstate commerce; that the Act permits a railroad employee to sue his employer for violation of FELA in federal court; and, finally, that any state action which discriminates state employees from other railroad employees is a violation of the Equal Protection Clause. This argument is

without merit. The outcome of which Rockwell complains is not a result of some arbitrary and capricious classification by the State of New Jersey. Rather, it is the result compelled by the Eleventh Amendment. In *Ex parte State of New York*, 256 U.S. 490, the Court noted:

> That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . . .

Id. at 497.

d. *Timeliness*

Finally, Rockwell asserts that New Jersey Transit's motion to dismiss for lack of jurisdiction is untimely, citing the defendant's previous silence both in its Answer and in the Final Pretrial Order. Fed. R. Civ. P. 12(h)(3), however, provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." As lack of subject matter jurisdiction may be raised at any time, the present motion is timely.

Thus, for the foregoing reasons, this court is without subject matter jurisdiction to entertain this suit. An order accompanies this opinion. No costs.

March 23, 1988

UNITED STATES DISTRICT COURT

District of New Jersey

Chambers of
ANNE E. THOMPSON
Judge

U.S. Courthouse
402 E. State Street
Room 343
Trenton, NJ 08608
(609) 989-2123

ORIGINAL TO CLERK

July 25, 1988

LETTER OPINION

TO: ALL COUNSEL AND/OR PARTIES

Re: Mazura v. NJ Transit Rail Authority, Civ. No. 84-4752
Hazelton v. N.J. Transit Rail Operations, Civ. No. 86-4854
Henderson v. NJ Transit Rail Authority, Civ. No. 87-1402
Scolise v. NJ Transit Rail Authority, Civ. No. 87-5073

Dear Counsel:

Pending before the court are motions to dismiss for lack of subject matter jurisdiction brought by New Jersey Transit Rail Operations, Inc. ["NJTRO"] in several actions brought against it under the Federal Employers Liability Act. 45 U.S.C. § 56, ["FELA"]. NJTRO bases its motions on a recent decision by Judge Wolin of this district which held that FELA did not authorize suits against NJTRO in federal court. *Fitchik v. New Jersey Transit Rail Operations*, Civ. No. 86-3060 (D.N.J. Jan. 26, 1988). This Letter Opinion resolves these pending motions by NJTRO.

In *Welch v. State Dept. of Highways and Public Transportation*, 107 S.Ct. 2941, 45 (1987), the Supreme Court overruled *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), insofar as it was inconsistent with the requirement that Congressional abrogation of Eleventh Amendment immunity be expressed in unmistakenly clear language. In *Fitchik*, based upon the fact that the Supreme Court in *Welch* recognized that FELA does not contain the requisite express abrogation and since it is well-settled that New Jersey Transit and its progeny are *alter egos* of the state, the court held that no federal jurisdiction exists over NJTRO. At least three other judges in this district have considered the same issue since *Fitchik*, and all have dismissed their pending complaints against NJTRO on these grounds. *See DeGirolamo v. New Jersey Transit Authority*, Civ. No. 86-3901 (D.N.J. March 21, 1988)(Brown, J.); *McIntosh v. Port Authority of New York and New Jersey*, Civ. No. 86-2536 (D.N.J. April 6, 1988)(Barry, J.); *Duffy v. New Jersey Transit Rail Operations*, Civ. No. 87-1284 (D.N.J. April 6, 1988)(Bissell, J.). This court concurs with the result and reasoning of these other decisions from this district holding that the Eleventh Amendment, as interpreted by *Welch*, precludes federal jurisdiction against NJTRO in an action brought under FELA.

The court also notes that in several of the NJTRO suits presently before it, the plaintiffs have advanced an argument that *Welch* should not be applied retroactively so as not to bar any action arising prior to that decision.

This argument was rejected by both Judge Barry in *McIntosh, supra,* and Judge Bissell in *Duffy, supra.* This court also finds that under the analysis set forth in *Chevron Oil v. Huson,* 404 U.S. 97 (1971), the *Welch* decision should be given retroactive application. The majority opinion in *Welch* itself stated that its decisions subsequent to *Parden* "leave no doubt" that it no longer was good law. 107 S.Ct. at 2948. Therefore, the decision did not establish a new principle of law by overruling a clear past precedent. *Chevron, supra* at 106-7. Secondly, the holding of *Welch* that federal courts do not have jurisdiction over these FELA cases would be advanced by applying the decision retroactively and dismissing such matters. Finally, retroactive application should not produce substantially inequitable results since FELA itself provides that suit may be brought in state court against a state-operated railroad. 45 U.S.C § 56. Moreover, as Judge Barry explains in *McIntosh, supra,* if any of these actions are refiled in state court, equitable tolling would prevent dismissal should a statute of limitations bar be advanced. *Cf. Burnett v. New York Central Railroad Co.,* 380 U.S. 424 (1965).

Very truly yours,

/s/ Anne E. Thompson
ANNE E. THOMPSON
U.S.D.J.

AET:mg

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORDER

It is on this 26th day of July 1988,

ORDERED that the complaints against the New Jersey Transit Rail Operations, Inc. in the following matters be and hereby are dismissed for lack of subject matter jurisdiction:

Mazura v. N.J. Transit Rail Operations, Civil No. 84-4572
Hazelton v. N.J. Transit Rail Operations, Civil No. 86-4854
Henderson v. N.J. Transit Rail Operations, Civil No. 87-1402[1]
Scolise v. N.J. Transit Rail Operations, Civil No. 87-5073

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

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[1] The entire complaint in this action cannot be dismissed at this time because a second defendant, Consolidated Rail Corporation also has been named.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH P. FITCHIK, Plaintiff,	:	Civil Action No. 86-3060
v.	:	OPINION
NEW JERSEY TRANSIT RAIL OPERATIONS, INC. Defendant.	:	ORIGINAL FILED JAN. 26, 1988

WOLIN, District Judge

Defendant by formal motion belatedly moves to dismiss plaintiff's complaint after the entry of the final pretrial order and one week in advance of the scheduled trial date. At issue is whether the United States District Court has jurisdiction to entertain and dispose of plaintiff's personal injury action or is prohibited therefrom by the doctrine of sovereign immunity embodied in the Eleventh Amendment. Because of the substantial nature of the question involved and the absence of undue prejudice by its determination, the Court finds that neither the Federal Employee's Liability Act, nor the Federal Safety Appliance Act authorize the plaintiff, who is a State employee, to sue the State of New Jersey in Federal Court.

New Jersey Transit Rail Operations, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey. It operates as a common carrier both within and without the State of New Jersey and is engaged in interstate commerce as that phrase is normally understood. Plaintiff is a citizen and resident of New Jersey. On or about December 30, 1985 he

was employed by defendant as a trainman at its Hoboken facility and suffered chronic, recurrent and permanent personal injury when the train struck a bumper block due to its inability to break and stop.

The relevent procedural history reveals that a Complaint was filed in the United States District Court on August 1, 1986 alleging jurisdiction pursuant to the Federal Employees Liability Act, 45 *U.S.C.* § 51, *et. esq.* (FELA) and The Federal Safety Appliance Act, 46 *U.S.C.*, § 1-26 inclusive.

Defendant answered the complaint on September 16, 1986 and participated in a pretrial conference on December 11, 1987. In neither the answer to the complaint nor the final pretrial order was the issue of jurisdiction questioned or challenged despite the June 25, 1987 decision in *Welch v. State Department of Highways and Public Transportation, et al*, 483 U.S. ___, 107 S.Ct. ___ 97 L.Ed 2d 389, (1987). Yet, the presence of R. 12 (h) (3) of the Federal Rules of Civil Procedure mandates dismissal of an action where the Court lacks jurisdiction of the subject matter.

The question of sovereign immunity and the interpretation of the Eleventh Amendment is not an issue *sui generis* to this district. In both reported and unreported decisions, this district has had multiple opportunities under varying circumstances to engage in the interpretative process and has uniformly held that a suit by one or more private parties seeking to impose liabilities, resulting in damages to be paid from public funds in the State Treasury, implicates and is barred by the Eleventh Amendment. *Gibson – Homans Co. v. New Jersey Transit Corp.*, 560 F. Supp. 110, 113 (D.N.J. 1982); *Saddle River*

Tours v. New Jersey Department of Transportation, et al. (Civ. No. 83-1776) (D.N.J., October 31, 1983) *aff'd.* 745 F.2d 48 (3rd Cir. 1984); *Hightower v. New Jersey Transit Rail Operations, Inc.*, (Civ. No. 84-1268) (D.N.J., August 27, 1984); *Dunn v. New Jersey Transit Corporation, N.J. Transit Rail Operations, Inc.* (Civ. No. 86-3312) (D.N.J., November 13, 1987). Each of these decisions was bottomed on the theory that New Jersey Transit and its progeny are the *alter egos* of the State of New Jersey and, therefore, immune from suit in the Federal Courts. No more persuasive statement of its character or purpose has been articulated with greater clarity than that reported in *Gibson-Homans, supra.:*

> "First, New Jersey Transit is by statute a State instrumentality performing an essential governmental function. As such, it has been granted complete immunity from state taxation. Second, the corporation does not have substantial autonomy from the state government in carrying out its functions. While the legislature has declared that the corporation is independent of any supervision or control by the Department of Transportation, it has also made the Commissioner of Transportation chairman of New Jersey Transit's governing board and has given him the responsibility of reviewing the corporation's budget. Moreover, whatever the relationship of New Jersey Transit to the Department of Transportation, it is clear that the corporation is not autonomous from the Executive Branch as a whole given Governor's power to appoint all of the members of the governing board, to remove them for cause and to veto any decision made by the board.
>
> Third, we find that any judgment against New Jersey Transit will have a financial impact on the state. While the state has disclaimed any responsibility for the debts and liabilities of the corporation, it has in

> fact appropriated over $100 million to New Jersey Transit for the current fiscal year. As New Jersey Transit points out, without contradiction by plaintiff, the fiscal realities of operating a public transportation system coupled with the inability of the corporation to incur debt or to raise money through sale of its own bonds, dictates the continuation of appropriations of state funds to New Jersey Transit. This substantial and continuing contribution of state money to New Jersey Transit's budget is a sufficiently direct effect on the State Treasury to support a finding that New Jersey Transit is the alter ego of New Jersey. *Fitzpatrick v. Bitzer*, 519 F.2d 559, 564-65 (2nd Cir., 1975), *rev'd on other grounds*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). This conclusion is further supported by the fact that all funds of New Jersey Transit are, by definition, public monies, since they may be placed in the New Jersey Cash Management Fund.
>
> Finally, we note that there are numerous indicia, not explicitly set forth in *Urbano* and *Blake* that New Jersey Transit is an arm of the state. Thus, it has been given the power of eminent domain, suits against it are governed by the New Jersey Contractual Liability Act and the New Jersey Tort Claims Act, it is within the jurisdiction of the Public Employees Relations Commission, it is subject to the New Jersey Administrative Procedure Act and Open Public Meetings Act, and it has been represented in this litigation, as it must be by statute, by the Attorney General's Office. 560 F. Supp. at 113-114.

The Eleventh Amendment to the Constitution of the United States expressly provides that:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State".

Although this precisely worded constitutional passage omits express reference to a citizen bringing suit against his/her own State its significance lies in its affirmation of the fundamental principle of sovereign immunity.

For the greater part of this century, it has been unequivocally established that the Eleventh Amendment bars a citizen from litigating against the citizen's own State in Federal Court. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842, (1890). *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, ___, S.Ct. ___, ___ L.Ed.2d ___ (1984). Exceptions to this principle such as when a state waives its immunity and consents to suit in the Federal Court, or where Congress demonstrates its intention to abrogate the State's constitutionally secured immunity from suit, are generally only found where such exception is expressly stated by unmistakably clear language. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Moreover, the immunity of an unconsenting State does not disappear when claims are asserted against state agencies, instrumentalities, and officers where the state itself is truly the real party in interest. *Edelman v. Jordan, supra.* at 663.

Overshadowing these considerations is the case of *Parden v. Terminal Railway of Ala. Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233, (1964), a decision that permitted an employee of a state-operated railroad company to bring an action in Federal Court under FELA absent (1) an express waiver to suit and (2) unmistakably clear *statutory* language abrogating the States' constitutionally secured immunity from suit in Federal Court.

(emphasis supplied). Its holding, however, was premised on a misinterpretation of Congressional resolve to make FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States." *Welch v. Department of Highways & Public Transportation, et al,* 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed. 2d 389, 398, (1987). Citing § 1, 35 Stat. 65, 45 U.S.C. § 51. Through this misjudgment it erroneously concluded that the State of Alabama had waived its Eleventh Amendment immunity. *Parden, supra,* at 186. Assuredly, to this limited extent, *Parden* is no longer of precedental value. *Welch, supra* at 399. *Employees v. Missouri Department of Public Health and Welfare, supra., Atasdero State Hospital v. Scanlon, supra.,* and *Pennhurst II, supra,* all reiterate "that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language . . . ".

Despite the wealth of constitutional authority reaffirming the Eleventh Amendment's containment of a broad constitutional principle of sovereign immunity, it was not until the recent case of *Welch v. Department of Highways & Public Transportation, et al., supra.,* that a majority of the Supreme Court concluded that the Eleventh Amendment bars a state employee from suing the State in Federal Court under the Jones Act, 46 U.S.C.S. App. § 688. In *Welch, supra.,* an employee of the Texas State Highway and Public Transportation Department was injured while working on a state-operated ferry dock. Her suit against the department and state was filed in the United States District Court. The District Court dismissed the action as barred by the Eleventh Amendment (533 F. Supp. 403). A Fifth Circuit Panel of the

United States Court of Appeals initially reversed, (739 F.2d. 1034) but on rehearing en banc the Court of Appeals affirmed the District Court's judgment on two grounds:

> 1) There was no unmistakable expression in the Jones Act of an intention to abrogate the States' Eleventh Amendment immunity from suit in Federal Court, and;
>
> 2) Texas had not consented to suit. (780 F.2d. 1268).

Ultimately when the Supreme Court granted certiorari, the questions presented in the petition were:

> (1) Whether the State Department of Highways and the State of Texas are immune from a Jones Act suit in U.S. District Court by a state employee/seaman by operation of the Eleventh Amendment to the U.S. Constitution.
>
> (2) Whether the doctrine of implied waiver of sovereign immunity as set forth in *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964) is still viable.

Welch, supra, 97 L.Ed.2d at 397, fn. 4.

The significance of the *Welch* case is that although the Jones Act applied the remedial provisions of the FELA to seaman, a majority of the court recognized that in neither of these pieces of legislation did Congress expressly abrogate states' immunity. A recitation of the pertinent Jones Act language is appropriate for understanding;

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . Jurisdiction in such actions shall be under the court of the district in

> which the defendant employer resides or in which his principal office is located." 46 USC § 688 [46 USCS App. § 688(a)].

Though the Act extends to any seaman and places jurisdiction in such actions with the district wherein the employer resides, the majority of the Court did not find the unmistakable statutory language necessary to permit the State to be sued in Federal Court under the Jones Act. Its rejection of language of general authorization references the antecedent doctrine that abjures waiver of sovereign immunity without unequivocally clear statutory language.

From *Welsh, supra.*, we discern that a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the states' Eleventh Amendment immunity from federal suit; that the general language of the Jones Act does not authorize suits against the states in federal court; that the FELA does not authorize suits against the states in federal court; and lastly the Eleventh Amendment prevents a state from being sued in federal court by one of its own citizens, unless the state itself consents to be sued. As stated in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951), "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation. . . ."

Based on the jurisdictional authorities cited *infra*, plaintiff's cause of action pursuant to FELA and the Federal Safety Applicance Act offends the sovereign immunity accorded to the States' by the Eleventh Amendment. Each statute lacks the enabling language necessary to sustain federal jurisdiction. Since plaintiff is a citizen

and resident of the State whose *alter ego* he has sued and since the record is manifestly barren of a waiver of immunity this Court finds it lacks jurisdiction over the subject matter.

Accordingly, the application to dismiss plaintiff's personal injury action is granted for the reasons asserted.

/s/ Alfred Wolin
ALFRED M. WOLIN, U.S.D.J.

Dated: 1-26-88

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH P. FITCHIK, Plaintiff	:	Civil Action No. 86-3060
v.	:	ORDER
NEW JERSEY TRANSIT RAIL OPERATIONS, INC. Defendant.	:	ORIGINAL FILED JAN. 26, 1988

This matter having come before the Court on a motion of W. Cary Edwards, Attorney General of New Jersey, by Grace A. Dennigan, Deputy Attorney General, appearing on behalf of defendant New Jersey Transit Rail Operations, Inc., and the Court having considered the papers submitted herein, this matter being decided under Fed.R.Civ.P. 78 and for good cause shown;

IT IS on this 26th day of January, 1988

ORDERED that the plaintiff's complaint is hereby dismissed for lack of jurisdiction.

/s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ASHRAF GHOBRIAL, Plaintiff	:	Civil Action No. 86-584
v.	:	ORDER
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	:	FILED MAR. 30, 1988
Defendant.	:	

This matter having been referred to G. Donald Haneke, United States Magistrate, pursuant to 28 U.S.C. § 636(b) (1) (B), on motion by defendant to dismiss this action for lack of subject matter jurisdiction, and the Court having reviewed the Report and Recommendation of Magistrate Haneke filed March 10, 1988, no objections having been filed, and good cause appearing,

It is on this 29th day of March, 1988,

ORDERED, that the Report and Recommendation of Magistrate Haneke is adopted as the opinion of the court; and it is further

ORDERED, that the motion of defendant to dismiss this action for lack of subject matter jurisdiction, should be, and hereby is GRANTED.

/s/ Alfred Wolin
ALFRED M. WOLIN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SIDNEY KINNEAR, Plaintiff	:	Civil Action No. 86-802
v.	:	ORDER
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	:	FILED MAR. 30, 1988
Defendant.	:	

This matter having been referred to G. Donald Haneke, United States Magistrate, pursuant to 28 U.S.C. § 636(b) (1) (B), on motion by defendant to dismiss this action for lack of subject matter jurisdiction, and the Court having reviewed the Report and Recommendation of Magistrate Haneke filed March 10, 1988, no objections having been filed, and good cause appearing,

It is on this 29th day of March, 1988,

ORDERED, that the Report and Recommendation of Magistrate Haneke is adopted as the opinion of the court; and it is further

ORDERED, that the motion of defendant to dismiss this action for lack of subject matter jurisdiction, should be, and hereby is GRANTED.

/s/ Alfred Wolin
ALFRED M. WOLIN, U.S.D.J.

W. CARY EDWARDS, ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendant, New Jersey Rail Operations, Inc.

By: Emerald L. Erickson, Deputy Attorney General
R. J. Hughes Justice Complex, CN 116
Trenton, New Jersey 08625
(609) 292-1530

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DENNIS MARTIN, Plaintiff	)	Honorable Alfred M. Wolin
v.	)	Civil Action No. 86-4937 (AMW)
NEW JERSEY TRANSIT RAIL OPERATIONS, INC. Defendant.	)	ORDER DISMISSING COMPLAINT
	)	FILED APR. 13, 1988

This matter having come before the Court on an Order to Show Cause why the Complaint should not be dismissed for lack of subject matter jurisdiction and the Court having considered the Report and Recommendation of the Honorable G. Donald Haneke, United States Magistrate, and the objection thereto filed on behalf of plaintiff, and for other good cause as set forth in the Court's letter opinion dated March 30, 1988;

IT IS on this 12th day of April, 1988,

ORDERED that plaintiff's complaint be, and hereby is, dismissed.

/s/ Alfred Wolin
ALFRED M. WOLIN, U.S.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KENNETH G. BANTA, Plaintiff	:	Civil Action No. 86-3413
v.	:	
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	:	ORDER
Defendant/Third Party Plaintiff,	:	FILED MAR. 29, 1988*
v.	:	
EVERETTE WHITENOUR, et al., Third Party Defendants.	:	

This matter having been referred to G. Donald Haneke, United States Magistrate, pursuant to 28 U.S.C. § 636(b) (1) (B), on motion by defendant to dismiss this action for lack of subject matter jurisdiction, and the Court having reviewed the Report and Recommendation of Magistrate Haneke filed March 10, 1988, no objections having been filed, and good cause appearing,

It is on this 29th day of March, 1988,

ORDERED, that the Report and Recommendation of Magistrate Haneke is adopted as the opinion of the court; and it is further

ORDERED, that the motion of defendant to dismiss this action for lack of subject matter jurisdiction, should be, and hereby is GRANTED.

/s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers Of
NICHOLAS H. POLITAN
Judge

USPO & COURTHOUSE BLDG.
NEWARK, NJ 07101

April 13, 1988

Re: David J. Chwaszczewski
Vs: New Jersey Transit Rail Operations
Civil Action No. 87-1535

Counsel:

For the reasons outlined in *Welch v. State Dept. of Highways and Public Transportation*, 107 S.Ct. 2941 (1987) as applied by Judge Wolin of this Court in *Fitchik v. New Jersey Transit Rail Operations*, Civil No. 86-3060 (D.N.J., filed January 26, 1988), Judge Fisher in *Rockwell v. New Jersey Transit Rail Operation*, Civil No. 84-4214 (D.N.J. filed March 24, 1988), and Judge Barry in *McIntosh v. P.A.T.H.*, Civil No. 86-2536 (D.N.J. filed April 6, 1988), this matter is dismissed for lack of subject matter jurisdiction.

A copy of the Order filed with the Clerk of the Court accompanies this letter.

Very truly yours,

/s/ NICHOLAS H. POLITAN
NICHOLAS H. POLITAN
U.S.D.J.

NHP:gf
Enclosure

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID J. CHWASZCZEWSKI, Plaintiff	:	Hon. Nicholas H. Politan Civil Action No. 87-1535
v.	:	*ORDER*
NEW JERSEY TRANSIT RAIL OPERATIONS, INC. Defendant.	:	ORIGINAL FILED APR. 14, 1988

This matter having come before the Court on a motion of W. Cary Edwards, Attorney General of New Jersey, by Adele C. Baker, Deputy Attorney General, appearing on behalf of defendant, New Jersey Transit Rail Operations, Inc., and the Court having considered the papers submitted herein, this matter being decided under *F.R.Civ.P.* 78 and for good cause shown;

It is on this 14th day of April, 1988,

ORDERED that the plaintiff's complaint against N.J. Transit Rail Operations, Inc. is hereby dismissed for lack of subject matter jurisdiction.

/s/ NICHOLAS H. POLITAN
NICHOLAS H. POLITAN
U.S.D.J.

STATUTORY PROVISIONS

Pertinent Portions of the New Jersey Public Transportation Act of 1976

N.J.Stat.Ann. 27:25-2(b)

As a matter of public policy, it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner.

N.J.Stat.Ann. 27:25-4(a)

There is hereby established in the Executive Branch of the State Government the New Jersey Transit Corporation, a body corporate and politic with corporate succession. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the corporation is hereby allocated within the Department of Transportation, but, notwithstanding said allocation, the corporation shall be independent of any supervision or control by the department or by any body or officer thereof. The corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.

N.J.Stat.Ann. 27:25-4(b)

The corporation shall be governed by a board which shall consist of seven members including the Commissioner of Transportation and the State Treasurer, who

shall be members *ex officio*, another member of the Executive Branch to be selected by the Governor who shall also serve *ex officio*, and four other public members who shall be appointed by the Governor, with the advice and consent of the Senate, for 4 year staggered terms and until their successors are appointed and qualified. At least one public member shall be a regular public transportation rider. Each public member may be removed from office by the Governor for cause. A vacancy in the membership of the board occurring other than by expiration of term shall be filled in the same manner as the original appointment, but for the unexpired term only. The first appointments shall be for 1, 2, 3 and 4 years respectively, and thereafter for terms of 4 years as stated. The board shall annually designate a vice chairman and secretary. The secretary need not be a member.

N.J.Stat.Ann. 27:25-4(f)

A true copy of the minutes of every meeting of the board shall be delivered forthwith, by and under the certification of the secretary thereof, to the Governor. No action taken at such meeting by the board shall have force or effect until approved by the Governor or until 10 days after such copy of the minutes shall have been delivered. If, in said 10-day period, the Governor returns such copy of the minutes with veto of any action taken by the board or any member thereof at such meeting, such action shall be null and of no effect. The Governor may approve all or part of the action taken at such meeting prior to the expiration of the said 10-day period.

N.J.Stat.Ann. 27:25-5(e)

Adopt, amend and repeal such rules and regulations as it may deem necessary to effectuate the purposes of this act, which shall have the force and effect of law; it shall publish the same and file them in accordance with the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) with the Director of the Office of Administrative Law;

N.J.Stat.Ann. 27:25-5(p)

Deposit corporate revenues in interest bearing accounts or in the State of New Jersey Cash Management Fund established pursuant to section 1 of P.L. 1977, c. 28 (C 52:18A-90.4);

N.J.Stat.Ann. 27:25-11(a) and (b)

a. All purchases, contracts or agreements pursuant to this act shall be made or awarded directly by the corporation, except as otherwise provided in this act, only after public advertisement for bids therefor, in the manner provided in this act, notwithstanding the provisions to the contrary of P.L. 1948, c. 92 (C. 52:18A-1 et seq.) and chapters 25, 32, 33, 34 and 35 of Title 52 of the Revised Statutes.

b. Whenever advertising is required: (1) specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of supplies and services necessary to meet the requirements of the corporation; (2) the advertisement for bids shall be in

such newspaper or newspapers selected by the corporation as will best give notice thereof to bidders and shall be sufficiently in advance of the purchase or contract to promote competitive bidding; (3) the advertisement shall designate the time and place when and where sealed proposals shall be received and publicly opened and read the amount of the cash, certified check, cashiers check or bank check, if any, which shall accompany each bid, and such other terms as the corporation may deem proper.

N.J.Stat.Ann. 27:25-15

The corporation may appoint an executive director, directors of operating divisions and other such additional officers, all of whom need not be members of the corporation, and may employ consulting architects, engineers, auditors, accountants, construction, management, real estate, operations and financial experts, supervisors, managers and such other professional consultants and officers and employees, and may fix their compensation, as the corporation deems advisable; and may promote and discharge such officers and employees, all without regard to the provisions of Title 11 of the Revised Statutes. In developing an employee compensation schedule, the corporation shall consult with appropriate authorities of the State and file such schedule with them upon completion. The corporation shall by October 31 of each year submit to the Governor and the presiding officers and the Transportation and Communications Committees of both Houses of the Legislature a list of all full and part-time officers and employees of the corporation and the salaries, wages and compensation received by said officers and employees during the preceding fiscal year.

The corporation may elect or appoint from among the members of its board or from its employees some or all of the members of the board of directors of any incorporated entity of which it owns part or all of the capital stock.

Employees of the corporation, or any of its subsidiary entities, shall be covered by whatever retirement plan or plans the corporation or subsidiary entity determines from time to time to maintain for those employees. However, if an individual is a member of the Public Employees' Retirement System or any other State-administered retirement system immediately prior to his initial employment by the corporation, he shall continue as or become, as the case may be, a member of the Public Employees' Retirement System for the duration of his employment by the corporation.

N.J.Stat.Ann. 27:25-16

The exercise of the powers granted by this act shall be in all respects for the benefit of the people of the State, and since the improvement, operation, and maintenance of public transportation services by the corporation constitute the performance of essential governmental functions, neither the corporation nor any wholly owned business corporation or other entity shall be required to pay taxes or assessments upon any public transportation project or any property acquired or used under the provisions of this act, including but not limited to, sales taxes, real property taxes or assessments, corporate franchise taxes or income taxes.

Because of the special nature of such property, the leasing for private use of a part of a structure that is part of any property whose primary use is as a public transportation passenger facility and which is located within an area in need of rehabilitation, as defined in section 2 of P.L. 1977, c. 12 (C. 54:4-3.96), shall not serve to remove the tax exemption of the corporation for the leased portion of the property, and shall not subject the lessee to taxation, the provisions of chapter 29A of Title 54 of the Revised Statutes and P.L. 1949, c. 177 (C. 54:4-2.3 et seq.) notwithstanding.

However, any property owned by the corporation or any wholly owned business corporation or other entity shall be considered "State" property as defined in P.L. 1977, c. 272 (C. 54:4-2.2a), and shall be subject to the in lieu tax payments provided in that act. In order that municipalities not suffer the loss of taxes by reason of the acquisition of property during 1980 by the corporation or any wholly owned business corporation or other entity under the provisions of this act, the corporation shall pay annually in two installments, May 1 and November 1, to each municipality, beginning in tax year 1981, a sum equal to the taxable value of the property, as determined for the tax year 1981, multiplied by the 1981 general tax rate for the municipality where the property is located.

Moreover, the corporation is hereby authorized and empowered, in its discretion, to enter into a voluntary agreement or agreements with any county or municipality, whereby it will undertake to pay an additional fair and reasonable sum or sums annually in connection with any property used primarily as a public transportation passenger facility, a portion of which is leased for private

use, which is located within an area in need of rehabilitation, as defined in section 2 of P.L. 1977, c. 12 (C. 54:4-3.96).

Nothing in this subsection shall deprive any municipality of replacement revenues that it would otherwise receive pursuant to sections 19 through 24 of P.L. 1966, c. 139 (C. 54:29 A-24.1 et seq.).

N.J.Stat.Ann. 27:25-19

Notwithstanding any of the provisions of the "New Jersey Contractual Liability Act" (N.J.S. 59:13-1 et seq.) to the contrary, contract claims and suits against the corporation shall be governed by said act.

N.J.Stat.Ann. 27:25-20

a. The corporation shall, by September 15 of each year, file with the Commissioner of Transportation a report in such format and detail as the Commissioner may require setting forth the actual, operational, capital and financial results of the previous fiscal year, the operational, capital and financial plan for the current fiscal year and a proposed operational, capital and financial plan for the next ensuing fiscal year.

b. On or before October 31 of each year, the corporation shall make an annual report of its activities for the preceding fiscal year to the Governor and to the presiding officers and the Transportation and Communications Committees of both Houses of the Legislature. Each such report shall set forth a complete operating and financial

statement covering its operations and capital projects during the year.

c. All records of minutes, accounts, bills, vouchers, contracts or other papers connected with or used or filed with the corporation or with any officer or employee acting for or in its behalf are hereby declared to be public records and shall be open to public inspection in accordance with P.L. 1963, c. 73 (C. 47:1A-1 et seq.) and regulations prescribed by the corporation.

d. The corporation shall cause an audit of its books and accounts to be made at least once each year by certified public accountants and the cost thereof may be treated as a cost of operation. The audit shall be filed within 4 months after the close of the fiscal year of the corporation and a certified duplicate copy thereof shall be filed with the Division of Budget and Accounting in the Department of Treasury.

e. Notwithstanding the provisions of any law to the contrary, the State Auditor or his legally authorized representative may examine the accounts and books of the corporation.

27:25-2 *Legislative findings and declarations*

The Legislature hereby finds and declares that:

a. The provisions of efficient, coordinated, safe and responsive public transportation is an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.

b. As a matter of public policy, it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner.

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-100

In The

Supreme Court of the United States

October Term, 1989

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

Petitioner,

vs.

JOSEPH P. FITCHIK, LINDA A. DeGIROLAMO, FELIX A. GUZMAN, SIDNEY KINNEAR, KENNETH G. BANTA, WILLIAM ROCKWELL, ROBERT K. HEATON, WILLIAM P. McKENNA, ANDY M. SEAMON, CRAIG A. CONLON, LAURENCE O'HALLORAN, DENNIS MARTIN, ROBERT G. STOCKER, SR., CLIFFORD E. WILLIAMSON, DAVID J. CHWASZCSEWSKI, ASHRAF GHOBRIAL, LOUIS D. ELLIS, WILLIAM HAZELTON, GEORGE FEATHERMAN, JOSEPH L. DUFFY, JAMES C. HARDEN, JR., EDWARD J. FLILLER, PHILIP ROXAS, CRAIG A. CONLON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Certiorari should be denied where the Third Circuit Court of Appeals, *en banc*, followed the principles and guidelines established by this Court concerning how to determine if an entity is entitled to "alter ego" status under the Eleventh Amendment to the Constitution, where the decisions of this Court establish a clear and workable standard to guide the lower courts how to make the "alter ego" determination, where that standard was followed by the Third Circuit and is also uniformly followed by the other circuits, and where this uniform standard led the Third Circuit to the factual conclusion, under the particular facts and the unique governmental and statutory scheme involved in this case, that the Petitioner, the parent corporation of an interstate railroad, was not the "alter ego" of the State because a judgment against it would have no impact on the State treasury, the State was not obligated to pay money judgments rendered against the railroad, the railroad had the ability to raise its own funds to pay any judgments, the railroad had authority to purchase liability insurance to protect itself from judgments, and further, because the railroad was sufficiently autonomous from the State?

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STATEMENT OF THE CASE

Respondents, members of various railroad crafts and employees of Petitioner, have filed individual FELA complaints, 45 U.S.C. §§ 51 et seq., in the United States District Court for the District of New Jersey against the Petitioner, an interstate railroad operating in the Northeast corridor. All of the Respondents alleged that they sustained injuries during the course of their interstate railroading employment on behalf of Petitioner, as a result of, *inter alia*, Petitioner's negligence. The Respondents all sought money damages.

These actions were dismissed by several district court judges on the grounds that the Petitioner could not be sued in federal court because of the Eleventh Amendment to the Constitution. The United States Court of Appeals for the Third Circuit, *en banc*, reversed these dismissals because it concluded that the Petitioner was not entitled to Eleventh Amendment protection.

The Petitioner operates an interstate commuter railroad which was owned and operated by Consolidated Rail Corporation (Conrail) until January 1, 1983. New Jersey Transit Rail Operations, Inc. (NJT), a subsidiary of the Petitioner, was established to accept the railroad equipment and facilities which were transferred from Conrail without consideration. NJT now operates the interstate commuter system in accordance with federal laws. *The Northeast Rail Service Act of 1981*, P.L. 97-35, Title XI, August 13, 1981, 45 U.S.C. § 744a; 45 U.S.C. § 586(g); 45 U.S.C. § 1104(3); 4 *U.S. Code Congressional and Administrative News* 4512-13 (1982). NJT is, in all respects, a traditional railroad in that it is subject to the regulations

of the Federal Railroad Administration, has employees who are members of traditional railroad labor unions vis-a-vis public employee unions and performs the same functions and activities as did Conrail when it operated the same railroad lines.

SUMMARY OF ARGUMENT

This Court has established clear principles and guidelines to be followed by the lower courts when determining whether an entity is an "alter ego" of a State entitled to Eleventh Amendment immunity from suit in federal courts. To assist in making this determination, the Circuit Courts of Appeals have identified several criteria to be examined, in light of the facts unique to each entity claiming "alter ego" status, as well as the particular statutory and governmental structures within which that entity operates. The criteria used by the different circuits, and the relative weight given to each criterion, are substantially similar and consistent with the principles and guidelines established by this Court. The lower courts do not need further guidance by this Court. Likewise, Petitioner's assertion that there is a conflict and divergence in the way that the circuits evaluate "alter ego" issues, is illusory. On the contrary, the circuits are substantially similar in their approach to "alter ego" questions. Action by this Court to supervise the lower courts, in their handling of this issue, is unnecessary. This case does not involve any issue of special importance or national concern which warrants review by this Court. No Rule 17 issue exists in this case.

The Petitioner's request that this Court review and second guess the Court of Appeals' analysis of the particular and unique facts of this case is misplaced. It is not the role of this Court, in our federal system, to review each factual determination. This Court should reject Petitioner's invitation to review each "alter ego" case which will subsequently arise.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. Introduction.

It is respectfully submitted that this Petition be denied because this case does not present any special or important issues for review. The issues claimed by the Petitioner to exist are illusory at best and do not present matters of the significance suggested by Rule 17. Instead, the dispute in this case revolves around the unique facts of this case, the specific statutory framework within which this particular entity was created and operates, and the application of this Court's clearly enunciated legal standards to those particular facts.

II. This Court Has Established Uniform Standards By Which Courts Of Appeals Can Determine Whether An Entity Is The "Alter Ego" Of The State For Eleventh Amendment Purposes.

Petitioner inaccurately suggests that this Court has not previously established criteria to assist the lower courts in determining whether an entity is the "alter ego"

of the state for Eleventh Amendment purposes.[1] In fact, this Court's prior decisions establish constitutional principles and specific and workable guidelines for the lower courts to follow, to effectuate those principles. This Court has consistently held,

> "[The] nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. [Citations omitted.] And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity . . . " *Ford Motor Co. v. Department of Treasury of the State of Indiana*, 323 U.S. 459, 464 (1945).

In addition to finding "alter ego" status where "the judgment sought would expend itself on the public treasury or domain," this Court also permits the finding of "alter ego" status where the effect of the judgment is to interfere with public administration. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

While both factors are relevant to determining "alter ego" status, the impact of the lawsuit on the public funds in the state treasury is the most important factor. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Lake County Estates v.*

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[1] An entity, even if not the state itself, is protected by the Eleventh Amendment if it is found to be the "alter ego" of the state. Note, *A Practical View of the Eleventh Amendment – Lower Court Interpretation and the Supreme Court's Reaction*, 61 *Georgetown L. Rev.* 1473, 1484 (1973).

Tahoe Regional Planning Agency, 440 U.S. 391, 400-01, (1979).[2]

The lower courts have uniformly analyzed potential "alter ego" entities with the purpose of determining whether a judgment will impact on a state treasury or interfere with a state's internal operations.

III. There Is No Confusion Among The Circuits Concerning How To Evaluate Entities For "Alter Ego" Purposes. The Circuits' Approaches To The "Alter Ego" Analysis Are Similar And All Circuits Rely On The Uniform Criteria Established By This Court.

The divergence which Petitioner claims exists among the circuits is illusory. The circuits follow the command of, *inter alia*, *Ford Motor Co.*, supra; *Dugan*, supra; *Edelman*, supra; and *Lake County*, supra, when evaluating entities to determine whether they are entitled to "alter ego" status. The circuits uniformly evaluate entities, which claim Eleventh Amendment protection, by determining if a judgment against the entity will impact on the state treasury or interfere with the state's internal policy machinery.

Petitioner cites sixteen (16) cases which it claims demonstrate the absence of uniformity among the circuits. A careful evaluation of these cases reveal that they

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[2] The emphasis on the financial impact that a lawsuit will have on a state treasury is justified by the history and basic purpose of the Eleventh Amendment which was to protect state treasuries and prevent the states' potential financial disaster. 61 *Georgetown L.Rev.*, supra at 1486, n.8 (1973).

do not demonstrate the absence of uniformity; but, on the contrary, a homogeneous approach to "alter ego" analysis.[3] The cases cited by Petitioner all utilize similar approaches, and evaluate the entities using similar criteria to determine whether the entity is entitled to Eleventh Amendment protection consistent with principles of federalism.

A detailed review of the criteria utilized by the courts in the cases cited by Petitioner will demonstrate the illusory nature of the alleged conflict:

Kashani v. Purdue University, 813 F.2d 843 (7th Cir. 1987) (recognized that the most important factor is the extent of the entity's fiscal autonomy from state; inquires whether judgment would impact on state treasury; considered state's oversight and control over entity's fiscal affairs; considered ability of entity to independently raise funds; considered whether entity is subject to state taxation; considered whether state would have to increase appropriations in response to a judgment); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985) (considered status of entity under state law; considered degree of state control over the entity; considered fiscal autonomy of entity;

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[3] Three of the cases cited by Petitioner are irrelevant to the "alter ego" issue. In *Clay v. Texas Women's University*, 728 F.2d 714 (5th Cir. 1984) and *Martin v. University of Louisville*, 541 F.2d 1171 (4th Cir. 1976), it was admitted that the entity was entitled to "alter ego" status and therefore, they contain no pertinent evaluation or discussion of "alter ego" determination. In *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975), the court did not decide the "alter ego" issue, but solely based its decision on a finding of voluntary waiver.

considered whether the entity's budget must be submitted for state approval; considered whether a judgment will be paid from state treasury; considered availability of entity's own funds to pay a judgment); *Hall v. Medical College of Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985) (considered status of entity under state law and decisions; recognized one of the most important factors is whether a judgment will be paid from state treasury; considered whether entity has its own funds to satisfy judgment; considered whether entity is separately incorporated; considered degree of autonomy entity has over its own operations; considered whether entity has the power to sue and be sued and the power to enter into contracts; considered if entity is immunized from state taxation; considered whether state has immunized itself from effect of entity's operations and debts); *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (considered whether judgment will be paid from public treasury[4]); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (most critical question is whether judgment will impact on state treasury; considered whether entity has ability to sue and be sued; considered the corporate status of entity; considered the entity's ability to take property in its own name; considered how state law treats entity); *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982) (considered how state law treats entity; considered degree of control state exercises over entity;

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[4] This case does not contain a detailed discussion of other factors relevant to the Court's "alter ego" conclusion, but the *Kashani* case, supra, identifies other factors utilized by the 7th Circuit.

considered nature of governing body of entity; considered whether entity has the power of eminent domain; considered whether entity can own its own property; considered the source of funding; considered degree of state regulation over entity; considered ability of entity to raise own funding); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd. sub. nom., Kush v. Rutledge*, 460 U.S. 719 (1983) (most important factor is source from which judgment will be paid; considered how entity is viewed by state law; considered whether entity has the power to sue and be sued; considered whether entity can take property in its own name; considered whether entity can conduct itself sufficiently independent of state); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) (considered impact of judgment on state treasury; considered availability of insurance funds to pay judgments; considered the exercise of independent powers by entity[5]); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (considered where entity obtains fiscal support; considered how entity's governing body is appointed); *Jagandin v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) (considered status of entity under state law; considered whether entity has the ability to sue and be sued; considered involvement of state in operation of entity; considered state's control over fiscal policies of entity; considered effect of judgment on state's fiscal autonomy; considered location of entity's funds in relation to other state funds); *Prebble v. Broderick*, 535 F.2d 605

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[5] *See, Rutledge*, supra, for other factors utilized by the 9th Circuit in its analysis.

(10th Cir. 1976) (considered impact of judgment on state treasury; considered source of entity's funding; considered entity's status under state law; considered manner of appointment of entity's governing body); *Brennan v. University of Kansas,* 451 F.2d 1287 (10th Cir. 1971) (considered status under state law; considered degree of control of entity by state; considered ownership of property by entity); *Walstad v. University of Minnesota Hospitals,* 442 F.2d 634 (8th Cir. 1971) (considered status under state law – here, state constitution declared entity an instrumentality of the state with immunities and protection).

Although the "alter ego" evaluations conducted by the various circuits, in the cases cited by Petitioner, do not use identical criteria or language, there is a *substantial similarity* among them. While some circuits may identify the criteria in more detail than other circuits, the thrust of the inquiry by all is the same:

> Will a judgment against the entity be paid from the state treasury and will the judgment interfere with the state's control of its own internal affairs?

In this case, the Third Circuit, *en banc,* analyzed the "alter ego" status of the Petitioner using criteria very similar to those utilized by the other circuits and fully consistent with the principles and guidelines established by this Court.[6]

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[6] Judge Becker, writing for the court en banc majority, wrote:

> "For clarity's sake, we divide the nine *Urbano* factors into three larger ques-

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These cases, when read together, reveal a common approach by the circuits for evaluating whether an entity is the "alter ego" of the state for Eleventh Amendment purposes.

There is no issue which requires review and guidance by this Court. The Circuit Courts of Appeals have, in following the opinions of this Court, developed criteria to determine whether an entity is the state's "alter ego."

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> tions: (1) Whether the money that would pay the judgment would come from the state . . . ; (2) the status of the agency under state law . . . ; and (3) what degree of autonomy the agency has." *Appendix to Petition for Certiorari* at 17a.

See also, Urbano v. Board of Mangers, 415 F.2d 247 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970); *Kovats v. Rutgers, the State University,* 822 F.2d 1303 (3d Cir. 1987); *Blake v. Kline,* 612 F.2d 718 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980), for other Third Circuit cases setting forth the criteria it uses when analyzing an entity to determine whether it should be given "alter ego" status.

It is interesting that this Court has twice before been asked to review the criteria used by the Third Circuit to evaluate an entity's "alter ego" status. The first case was *Urbano,* supra, where certiorari was denied at 397 U.S. 948 (1970). The second case was *Blake,* supra, where certiorari was denied at 447 U.S. 921 (1980). *Urbano* enunciated the criteria which the Third Circuit uses in its "alter ego" analysis, and *Blake* applied those criteria. *See,* 48 *U.S.L.W.* 3688 (4-22-80). The Third Circuit's analysis of "alter ego" matters was neither of sufficient national importance nor inconsistent with the rulings of this Court, or other circuits, nor did it raise a Rule 17 issue, when certiorari was denied in *Urbano* and *Blake,* and for the same reasons it should be denied in this case.

These criteria are substantially similar and uniform. The approaches to the question are not divergent, but homogeneous. Accordingly, no Rule 17 issue of national importance exists in this case. The Petition should be denied.

IV. Review Of This Case Invites Review Of Every "Alter Ego" Analysis Performed By A Lower Court. The Unique And Individual Facts Of This Case Do Not Warrant Granting Of Certiorari. The Third Circuit Court Of Appeals Followed This Court's Guidelines When Determining Whether New Jersey Transit Was Entitled To Eleventh Amendment Protection.

The Petitioner suggests that certiorari should be granted because the Third Circuit Court of Appeals, *en banc*, allegedly misapplied the "alter ego" criteria *to the facts of this case*. Even if this were true, a decision based on the unique factual analysis of a single case does not present issues of significant national concern and importance to warrant the granting of the Petition. If the Court examines this case, to determine whether a Court of Appeals, *en banc*, properly applied the legal standards to the peculiar situation involving this entity, then this Court invites review of every "alter ego" decision which will arise in the future. Our constitutional scheme does not intend for this Court to be burdened with second guessing myriad decisions based on the unique facts, statutes and governmental schemes involved in each case.[7] Accordingly, it is respectfully submitted, that this

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[7] Courts of Appeals, which have been called on to determine the "alter ego" issue, have found that each entity exists in

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Court should reject Petitioner's request that it become involved in a factual dispute. The Petition should be denied.

Furthermore, to correct any misunderstanding caused by the Petition, it is important to emphasize that the Third Circuit, *en banc's*, decision properly decided this case on its merits.

The Court of Appeals, *en banc*, determined that a judgment against the Petitioner would not impact on the State treasury. The majority noted that passenger fares accounted for $289 million of the $313 million in Petitioner's operating revenues; that less than one-third of Petitioner's operating funds came from the State; that the State has specifically disclaimed, and has fully immunized itself from liability arising from a judgment against the Petitioner; and that the State is under no obligation to pay Petitioner's debts or to reimburse it for judgments it pays. Further, the Petitioner can raise its own revenue and is authorized to purchase liability insurance to protect itself, and the State, from the effect of any judgment. Although the Petitioner's funds are described by state law as public, the majority notes that that designation is irrelevant as the public money designation also applies to the funds of counties and municipalities which are not entitled to Eleventh Amendment protection. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.

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a unique governmental context and that each must be considered on the basis of its own particular circumstances. *Long*, supra at 77; *Hall*, supra at 302; *United Carolina*, supra at 557. This is a role best suited to lower courts and not this Court.

274, 280-81 (1977). On balance, the majority found that the funding factor weighed strongly against "alter ego" status. *Petition Appendix* at pp. 18a-24a.

On the criterion of status under state law, the majority found that some factors weighed in favor of "alter ego" while other factors weighed against it. The majority concluded, "Because [Petitioner's] status under New Jersey law is uncertain, the analysis of this factor does not significantly help in determining whether NJT is entitled to immunity from suit in federal court." *Petition Appendix* at p. 25a. On balance, the majority found that these factors "tilted only slightly" in favor of "alter ego" status.[8]

Likewise, the majority analysis of the autonomy issue led to the conclusion that, although not "highly autonomous" as some entities, the Petitioner is still "significantly autonomous." The majority concluded that this issue also weighed only slightly in favor of immunity. *Petition Appendix* at pp. 27a-28a.

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[8] Petitioner insinuates that the New Jersey state courts have treated it as the "alter ego" of the State. The cases, listed in a footnote on p. 14 of the Petition, are actually irrelevant. These cases deal with a "public entity" exemption of the New Jersey Motor Vehicle Financial Security Act, 39 N.J.S.A. 6-54. The exemption applies to any "public entity" including a state, political subdivision, county or municipality. The cases conclude that Petitioner is a public entity under the Act. This conclusion has no bearing on the Eleventh Amendment "alter ego" issue because counties and municipalities, which are also exempted as public entities, are not entitled to "alter ego" immunity. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

When balancing the funding factor which weighed heavily in favor of no Eleventh Amendment protection, against the other factors which just barely tilted in favor of protection, and when viewing these factors in the light of the Eleventh Amendment's purpose of protecting state treasuries from the effect of judgments[9], the majority found that the Petitioner was not entitled to Eleventh Amendment protection. *Petition Appendix* at p. 29a. Contrary to the Petitioner's assertion, this conclusion was not premised on an unrealistic understanding of the facts, but on an impartial and well-reasoned evaluation of the facts particular to this case. There was no error by the Third Circuit and its decision should not be reviewed. Accordingly, this Petition should be denied.

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[9] By protecting the state treasury the state's autonomy is also protected as a litigant cannot force a state to reallocate public funds as a result of its treasury's depletion due to payment of a judgment.

CONCLUSION

For these reasons, Respondents respectfully request that this Honorable Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Dated: August 17, 1989